84-689 (1)

Office - Supreme Court, U.S.
FILED
OCT 25 1984
ALEXANDER L. STEVAS,
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No. 84-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BRUCE POOLAW,

Petitioner,

v.

CITY OF ANADARKO, OKLAHOMA; MAYOR OF ANADARKO, CLARK MCCASKILL; CITY MANAGER, ROYCE HUNTER; FORMER ACTING CHIEF OF POLICE, J.C. GIVENS; AND FORMER ACTING CITY MANAGERS, BOB WILKERSON AND RON MADISON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE TENTH CIRCUIT

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79 P

QUESTIONS PRESENTED

Whether the Court of Appeals erred in upholding Trial Court's dismissal of Plaintiff's Title VII claim.

Whether the Court of Appeals erred in upholding Trial Court's remittitur of Punitive damages in conection with § 1981 Claim.

Whether the Court of Appeals erred in upholding Trial Court's failure to award attorney's fees equal to the time spent by the successful Plaintiff.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of The United States:

BRUCE POOLAW, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States District Court of Appeals for the Tenth Circuit entered in the above entitled case on June 27, 1984.

OPINIONS BELOW

The June 27, 1984, opinion of The United States District Court of Appeals for the Tenth Circuit, whose judgment is herein sought to be reviewed, is reported at 738 F.2d 364; is reprinted and attached hereto, as Appendix A to this Petition, at page 1a.

The prior Tenth Circuit opinion of 1981, is reported at 660 F.2d 459, and is reprinted and attached hereto, as Appendix B to this Petition, at page 9a.

The Jury Verdict rendered in favor of the Plaintiff on April 16, 1982, is reprinted and attached hereto, as Appendix C, at page 27a.

The Journal Entry of Judgment rendered by the United States District Court for the Western District of Oklahoma, dated May 27, 1982, remitting punitive damages and denying Title VII relief, is reprinted and attached hereto, as Appendix D, at page 29a.

The Journal Entry of Judgment, dated May 28, 1982, denying Plaintiff's attorneys a reasonable fee, is reprinted and attached hereto, as Appendix D, at page 29a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1984. On September 22, 1984, Mr. Justice, Byron R. White, entered an Order extending the time for the filing of this Petition to and including October 25, 1984, the jurisdiction of this Court is envoked pursuant to 42 U.S.C. § 1981, 42 U.S.C. § 1983 and 42 U.S.C. § 2000 (e), et. seq.

STATUES INVOLVED

42 U.S.C. § 1981. Equal Rights Under the Law. All persons within the jurisdiction of the United States shall have the right in every State and Territory to make and

enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, license, and exactions of every kind and to no other.

42 U.S.C. § 1983. Civil Action for Deprivation of Rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at Law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 2000(e) seq. Discrimination because of Race, Color, Religion, Sex, or National Origin. It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin. (42 U.S.C. § 2000(e)-2)

STATEMENT OF CASE

Plaintiff, Bruce Poolaw, is a fourty year old American Indian,[1] from the Kiowa Tribe[2] with a college education and extensive training in law enforcement.[3]

The City of Anadarko is a "home rule" City under Oklahoma Law,[4] and has adopted a City Code[5] for the purpose of carrying out their municipal rules, regulations, and functions. In accordance with th City Code, no police officer shall be discharged without cause[6]. In the event of discharge a police officer may appeal his discharge within fifteen (15) days from the date of the discharge[7] to the Policeman's Board of Review.[8] Appeals from the decision of the Board may be taken first to the District Court of Caddo County and thereafter to the Supreme Court of Oklahoma. The decision of the Supreme Court shall be final.[9]

Poolaw was hired by the Anadarko Police Department in January, 1977.[10] He worked for that Police Department for a little more than a year and had, at one time, been commended for his work.[11] Never in the term of his employment

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[1]TII – 427

[2]TII – 428

[3]TII – 428-430

[4]Charter of City of Anadarko – App. E

[5]City Code of Anadarko – App. F

[6]City Code Prov. Art. 21 1-64 (App F)

[7]7 City Code Prov. Art. 21 1-65 (App F)

[8]City Code Prov. Art. 21 1-62 (App F)

[9]City Code Prov. Art. 21 1-65 (App F)

[10]TII – 433

[11]TII – 422

did he receive a reprimand for any job duties performed or for anything else.[12]

Then on January 4, 1978, the Chief of Police of the City of Anadarko, J. C. Givens, informed Poolaw that he was terminated because he had a driving while intoxicated record.[13] Poolaw insisted that he had no such driving record and asked for a formal complaint in writing, with proof to support the claim.[14] Following the conversation with Givens, Poolaw was informed by Assistant Chief, E. M. Salmon, Jr., that he could file an appeal with the Policeman's Board of Review, within fifteen (15) days, if he did not feel the termination was justified.[15]

Poolaw thereafter filed his appeal within the required fifteen (15) days.[16] After several postponements and six months later, Poolaw received his first hearing.[17] No determination made at that time, and the Board's decision was further postponed until August 8, 1978. On August 8, a five member Board was present and found, based upon the testimony and written evidence presented, at the hearing, that there was insufficient evidence to sustain the City Manager's action in terminating Poolaw's employment. Further, that such termination was without sufficient legal cause.[18]

Approximately the same time of Poolaw's discharge, another officer, Bill Weeks, a Caucasian, was also discharged

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[12]TII – 449

[13]TII – 451

[14]TII – 456

[15]TII – 456

[16]TII – 462

[17]TII – 474

[18]TII – 490

by the City of Anadarko.[19] When the Policeman's Board of Review found that Weeks had been terminated without cause, he was reinstated, with back pay, and with full seniority.[20]

Subsequently, Poolaw went to the office of Royce Hunter, the new City Manager, and requested, in accordance with the Board's ruling, that he be reinstated. He was told that he could not come back to work because they did not want him to come back to work, irrespective of any ruling by the Board.[21]

Weeks' wrongful dismissal lasted approximately ten (10) days. Poolaw's wrongful dismissal, has lasted six years.

The City of Anadarko had a duty and responsibility to either reinstate Poolaw or appeal the decision of the Board, within thirty (30) days, to the District Court of Caddo County, Oklahoma, as provided by the Statutes and City Ordinances of the State of Oklahoma and the City of Anadarko. After the expiration of thirty (30) days, and no appeal was forthcoming from the City, the decision of the Board became final and Poolaw should have been reinstated.

Upon the City's continued refusal to reinstate him, Poolaw thereafter filed a timely complaint with the Equal Employment Opportunity Commission.[22] However, before the Commission rendered a decision in his case, Poolaw asked for and received his Letter of Right to Sue.[23] Then on July 19, 1979, Poolaw initiated his action in the United

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[19]TI – 197

[20]TI – 198

[21]492 et seq

[22]EEOC Comp. (lodged)

[23]Letter for Right to Sue (App G)

States District Court for the Western District of Oklahoma, as amended October 1, 1979.

In his Complaint Poolaw sought relief pursuant to 42 U.S.C. § 1983, providing for redress for deprivation under color of State Law, of rights, privileges and immunites secured by the United States Constitution; pursuant to 42 U.S.C. § 1981, providing for equal benefits, like punishment, damages and injunctive relief against racial motivated misuse of government power; and pursuant to Title VII of the Civil Rights Act of 1964, as Amended 42 U.S.C. § 2000(e), et.seq., against racial discrimination in employment, claiming violations against him, as an American Indian, in hiring, firing, promotion, equal pay, transfers, seniority and equal employment opportunities as those afforded Caucasians with the same or lesser training and experience.

LOWER COURT RULINGS

On October 12, 1979, the City of Anadarko moved to dismiss Poolaw's Complaint. A hearing was held on October 18, 1979, and on October 31, 1979, the Court entered its Order dismissing Poolaw's case across the board, concluding that Poolaw had failed to state a claim upon which relief could be granted under 42 U.S.C. §§ 1981 and 1983 and further that Poolaw had failed to timely file his Title VII claim.

Poolaw appealed the Trial Court's decision to the United States Court of Appeals for the Tenth Circuit, oral argument was allowed, and on October 21, 1981, the Tenth Circuit reversed the Trial Court's decision.[24] The Appellate Court concluded inter alia, that Poolaw had stated a cause of

[24]APP B

action under all three claims; that Poolaw had timely filed his Title VII claim; and remanded the same for trial.

Poolaw was granted a trial by jury on his §§ 1981 and 1983 claims and the Court took the Title VII claim under advisement. Following substantial discovery, a four day trial, and four hours of deliberation by nine jurors, the jury found in Poolaw's favor on both his §§ 1981 and 1983 claims.[25]

As to Poolaw's § 1981 claim for equal benefits, like punishment, damages, and injunctive relief against racial motivated misuse of government power, the jury awarded $10,000.00 in actual damages and $40,000.00 in punitive damages against the City of Anadarko.

As to Poolaw's § 1983 claim for due process and equal protection, the jury awarded $1.00 each in nominal damages against the City of Anadarko, Royce Hunter, and Ron Madison and further awarded $1,000.00 in punitive damages against Ron Madison individually.

The total damages awarded Poolaw by the jury were $51,004.00. The Trial Court again took the Title VII claim under advisement.[26]

The City of Anadarko thereafter filed their Motion for Judgment Not Withstanding the Verdict, Motion for New Trial, and Motion to Deny Relief under Plaintiff's Title VII claim. On May 27, 1982, the Trail Court sustained the City's Motion for Judgment Not Withstanding the Verdict, with regard to the punitive damages only, and struck from the verdict, the $40,000.00 punitive damage award against the City of Anadarko. All other particulars of that Motion were denied. The Court further denied in full Defendant's Motion

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[25]APP C

[26]APP C

for New Trial and sustained Defendant's Motion to Deny Relief under Plaintiff's Title VII claim.[27]

The next day May 28, 1982, the Court heard Motions for Attorney Fees. In total disregard of the expert testimony and evidence presented, the Trial Court awarded the prevailing Plaintiffs' Attorneys, one of which had been in this case ab initio, (over three years), $20,000.00, instead of the $121,000.00 for which they jointly requested.[28]

On June 22, 1982, Poolaw filed his second Notice of Appeal with the United States Court of Appeals for the Tenth Circuit, and thereafter Poolaw timely appealed. Oral argument was allowed and on June 27, 1984, two years later, the Appeals Court entered its decision against Poolaw on the following issues: (1) that municipalities could not be held liable for punitive damages under 42 U.S.C. § 1981; (2) that Plaintiff failed to establish a claim under Title VII; and (3) that the Trial Court did not abuse it's discretion in awarding Attorneys Fees.[29]

The Appeals Court upheld the jury award of $10,000.00 in actual damages in favor of Plaintiff.[30]

REASONS FOR GRANTING WRIT

I. CERTIORARI SHOULD BE GRANTED TO REVERSE APPELLATE COURT'S DENIAL OF TITLE VII CLAIM.

Poolaw asserts that the Trial Court and Appellate Court erred in several ways in denying his Title VII claim. As the Trial Court stated numerous times during the trial and also

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[27]APP D

[28]APP D

[29]APP A

[30]APP A

in the Instructions to the Jury, it was not necessary for Poolaw to prove that the challenged action rested solely on racially discriminatory purposes, all that is necessary is proof that a discriminatory purpose had been a motivating factor behind the injurious actions.[31] Poolaw contends that he proved this beyond a reasonable doubt, and the jury verdict speaks for itself in awarding Poolaw $10,000.00 in actual damages and $40,000.00 in punitive damages on his § 1981 claim.[32]

Even though the Courts have held that Title VII and § 1981 are not mutually exclusive, when coupled in a case such as this, it is proper to infer discriminatory intent from the fact of disparate treatment.[33]

Poolaw further contends that it was not the law but the confusing facts of this case, along with the sophistry of the City of Anadarko, which misled the Courts, and covered up the real issues herein. For the sake of clarity each error will is subdivided.

A. The Discharge:

1) On January 4, 1978, Bruce Poolaw received a Memo from the then acting City Manager, Ron Madison, stating that he had falsified facts on his employment application; that debtors were constantly calling regarding past due bills; there had been citizen complaints; and there had been false and bogus checks written by him.[34]

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[31]See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) and *Lewis v. Bethlehem Steel Corp.*, 440 F. Supp 949, 966 (D. Md. 1977)

[32]APP C

[33]*Whiting v. Jackson State University*, 616 F. 2nd 16, 120 – 121 (5th Cir., 1980)

[34]Memo From Ron Madison APP H

2) Poolaw was thereafter given a hearing.

3) At the hearing it was determined that insufficient evidence existed to support Poolaw's termination, and that *he should be reinstated.*[35]

4) The City had an option — 1) appeal or 2) reinstate Poolaw.

5) The City did neither.

The question before this Court is not whether Poolaw falsified his application; whether debtors were calling; whether citizens had lodged complaints against him; or whether he had written bogus checks. Poolaw contends all those questions were settled at Policeman's Board of Review hearing on August 8, 1978. The sole question before this Court, under this proposition, is whether he was discriminated against under Title VII.

Poolaw believes he was discriminated against because of race and national origin. This belief is supported by the acts and conducts of the City and its agents, as follows:

1) There were two Caucasians promoted over Poolaw with less seniority and training than he;

2) There was a Caucasian who was terminated and reinstated within ten (10) days, with back pay and full seniority, when it was determined by the Board he had been terminated without cause; and

3) Poolaw was never reinstated, eventhough the Board had ruled in his favor.

Poolaw further succeeded in raising the inference of discriminatory intent by showing disparate treatment as

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[35]Letters By Board Members APP I1 – I3

a statistical fact, along with proof of actual malice shown toward him by the City Officials.

In addition to the foregoing, the City by its own acts, has shown malice toward Poolaw. When the Policeman's Board of Review rendered a decision in favor of Poolaw, the City had thirty (30) days to appeal that decision to the District Court of Caddo County, Oklahoma. When the City failed and refused to make such appeal, the decision of the Board became final and binding. Yet, Poolaw was never reinstated. Why? Poolaw says because *he is an Indian.*

B. Guidelines for Proof of Discrimination.

Poolaw believes that he has established, without question, a prima facia case of discrimination. According to the guidelines set out in *McDonnell Douglas Corp. v. Green,*[36] Poolaw is (1) a member of a protected class; (2) qualified for the job from which he was suspended or discharged and not rehired or reinstated; (3) he was terminated; and (4) after his termination the employer hired a person not from the same protected class or retained those having lower or lesser qualifications, not in Poolaw's protected class.[37]

The Appellate Court, relying on the *Watley v. Skaggs, case,*[38] stated that when the burden shifted to the Defendant's to show a non-discriminatory, legitimate reason for firing Poolaw, that the Trial Court was put in a fact-finding position to decide the ultimate issue. Poolaw alleges that while they attempted to make this showing, based on the

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[36]411 U.S. 792 – 802-805, 93 S.G. 1817, 36 L. Ed. 2d 668 (1973)

[37]*Whiting v. Jackson State University,* supra

[38]707 F. 2d 1129, 1135-36 (10th Cir.) Cert. denied; ____ U.S. ____, 104 S. Ct 528, 78 L. Ed 2d 314 (1983)

evidence presented and the transcript, *these facts had already been decided by the City, back in 1978, by the City's own Policeman's Board of Review,*[39] who at that time, found insufficient evidence to discharge Poolaw.

Why was Poolaw never reinstated by the City, when the Board found there was insufficient evidence to support such discharge?

Why have a Policeman's Board of Review, if its decisions are to be thrown to the wind and their decisions disregarded?

Is the City allowed to pick and choose which decisions they like or dislike and then terminate or reinstate at will?

Poolaw says YES. *And discrimination is the underlying factor for the acceptance or rejection of the Board's decisions.*

C. Trial Courts Discussion with Juror.

Poolaw further contends that the Trial Judge was persuaded in his decision, by comments made by a juror. To support this fact Poolaw would show:

In footnote 3 of the Appellate Court's decision, upholding the Trial Court's ruling, it is stated:

> "We do not believe, as Poolaw contends, that the district judge improperly based his ruling on a remark made outside of the record by one of the jurors. We find it untenable to suppose that the trial judge would disregard four days of testimony and other evidence, admitted through proper channels at trial, in order to be swayed by a jurors extraneous comments."[40]

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[39]APP I1 – I3

[40]APP A

However, a close scrutiny of the transcript of the May 27, 1982 hearing reveals the following:[41]

> (Judge Eubanks) "All right. Well, what I'm to do, and *let me tell you why I'm going to do it.* A few days after this award, one of those jurors was in the box and connected with another civil rights case. You know inquiring if they had any experience, she said yes, she had. We found out it was in that case. *She made it clear that your award in the Anadarko case was based upon the failure to afford due process*, Mr. Constantikes, *on the theory that the Plaintiff was discharged for reasons other than those given him in that letter and so forth.* But *the City did not afford him any due process at all in that regard, and that's how come he won the case. I believe that I think's right.*

First, the Judge and juror are both obviously confused. A review of the Jury Verdict will show that Poolaw received judgment against the City of Anadarko, in the amount of $10,000.00 actual damages and $40,000.00 punitive damages, *not on the due process question*, but on his § 1981 claim, which provides for equal benefits, like punishment, damages and injunctive and other relief against *racially motivated misue of government power.* Second, on the due process question, § 1983, the jury awarded only $1.00 each in nominal damages against the City of Anadarko, Royce Hunter, and Ron Madison and further awarded punitive damages in the amount of $1,000.00 against Ron Madison, individually.[42]

Based on those facts alone, how can anyone determine that Poolaw won his case solely because he was not afforded due process.

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[41]Motion Hearing 5/27/82 @ p.13

[42]Verdict – APP C

In addition thereto, at the May 27, 1982, hearing, upon further inquiry by counsel, the Court indicated that he denied Title VII relief, because Poolaw did not prove discriminatory intent, and *"the jury did not find any. The jury did not find any.*[43]

Poolaw's question is how does the Judge know what the jury intended, he was not present in the jury room during deliberation, unless he based his assumption upon the statements of an obviously confused juror. The juror making these statments probably has had no legal training and as the Judge himself admitted, made this statement, *"several days later."* The significant portion of the Poolaw verdict, as heretofore stated, was based upon his § 1981 claim, not the due process claim.

Poolaw finds it hard to believe that two such inconsistent judgments could be rendered between the jury and the Judge,[44] when each was based upon the same evidence and testimony presented at trial. As the Trial Court stated numerous times during the trial, and also in the instructions, it is not necessary for a Plaintiff to prove that the challenged action rested solely on racially discriminatory purposes; all that is necessary is proof that a discriminatory purpose has been a motivating factor behind the injurious action.[45]

D. Pendent Jurisdiction Claim.

Furthermore, at the May 27, 1982, the Judge stated:

"Then if there would have been a pendent jurisdiction claim on the contract, or whatever, failure to reinstate

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[43]Motion Hearing 5/27/82

[44]Motion Hearing 5/27/82 pg. 13-14

[45]*Village of Arlington*, supra

him, he would have been entitled to an instructed verdict on that."[46]

Poolaw contends, that it has been held time and time again, by this Court and the lower Appellate Courts, that the Eleventh Amendment bars a pendent state claim for injunctive relief against state officials sued in Federal Court. Therefore, Poolaw did not raise such issue.

Based on the foregoing, Poolaws contends that the appeallate Court erred in not reversing the Trial Court's dismissal of his Title VII claim.

II. CERTIORARI SHOULD BE GRANTED REINSTATING JURY AWARD OF PUNITIVE DAMAGES IN THE AMOUNT OF $40,000.00

Poolaw contends that the Appellate Court erred in upholding Trial Court's decision in striking the $40,000.00 in punitive damages which the jury awarded against the City of Anadarko, under 42 U.S.C. § 1981, concluding that punitive damages are not recoverable against a Municipality.

It is well settled that actual and compensatory or punitive damages may properly be awarded private Plaintiffs when suing under 42 U.S.C. § 1981,[47] even when coupled with a Title VII claim. However, the law is still unsettled and at the best unclear, as to whether or not punitive damages should be awarded against a Municipality.[48a]

Poolaw contends that a close scrutiny of the statute lends itself to racially motivated misuses of government power. The fact that the statute deals with denial of civil rights by

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[46]Motion Hearing 5/27/82

[47]76 F R D 136, 141-42 and N. 5 (1977)

[48a]*Johnson v. Railway Express Agency*, 522 F. Supp 1/15 (1981)

government powers would naturally go to include a municipality. 42 U.S.C. § 1981 is not subject to the same jurisdictional limitations as 42 USC § 1983, and thus municipal defendants are subject to suit under § 1981, but not under § 1983.[48b]

To begin with, the City of Anadarko is known as the "Indian Capitol of the World". Through statistics, Poolaw showed that while almost one-half the population of the City is Indian, less than 3% hold governmental jobs. The City has been run for years by the "White Aristrocracy". Furthermore, there is a great prejudice within the City itself to its Indian population, in that the white members of the community do not socialize with the Indian portion of the community, and see them only as ignorant and uneducated.

"Punitive Damages" are awarded against persons to punish them for their outrageous conduct and to deter them and others like them from similar conduct in the future.[49]

The City of Anadarko is a "home rule" City under Oklahoma Law, and has adopted a City Code for the purpose of carrying out their municipal rules, regulations and functions. These rules, regulations and functions, in addition to providing and maintaining order in the community, also act to protect the citizens of the City from wrongful and overt acts of the elected officials, and secure their rights as citizens.

The City of Anadarko places upon its Officers certain ministerial duties. These duties leave nothing to the discretion of the person performing them and are based upon mandates of legal authority. Furthermore, the City Officials

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[48b]*Davis v. County of Los Angeles* (1977, CA 9 Cal) 566 Fed. 2d 1334.

[49]*Silkwood v. Kerr McGee Corp.*, 667 F. 2d 908

should follow these laws and mandates, until such time as they are amended or changed.

When a City, acting through its agents, servants and employees, enters into a conspiracy, by agreeing to achieve an unlawful objective, (in this case, discrimination), then, in such event, the mantle of sovereign immunity should be shed, and the City should be held liable for such acts.

Poolaw further asserts, that when such acts of the City, through it's agents, servants and employees, as a whole, are malicious, oppressive and detrimental to a person, in deprivation of his rights, as secured by the Constitution of the United States of America, then punitive damages should stand against a municipality, as a whole, to ensure that the community is made aware of the type of people running their government.

The appellate Court states that punitive damages are intended to punish wrongdoers, rather than compensate victims, and that the wrongdoers in this case, were the individuals who discriminated against Poolaw. However, in this instance, the wrongdoers were the agents, servants and employees of the City of Anadarko. Further, it was not just one person, but it was four duly appointed or elected City officials working in concert with the other to intentionally discriminate against Poolaw, under color of State law.

The appellate Court further states that an award of punitive damages against a municipality, on the other hand punishes only the taxpayers, who took no part of the commission of the tort and that such burden should not be placed upon the shoulders of the blameless or unknowing taxpayers. Poolaw contends that:

1) It is the taxpayers who elected and placed into office, the City Officials in question, who committed the tort.

2) How else are the taxpayers to know if their duly elected and appointed officials are carrying out the intent and purposes of their office. If City officials are allowed to commit torts against citizens, and then allowed to hide behind Municipal immunity, the community will never know of such acts.

The appellate Court further states that punitive damages are also intended to stop future wrongdoing. However, if the City Officials, the wrongdoers here, are not punished, and allowed to go free under the guise of Municipal immunity, how are the City officials to be stopped from future wrongdoing, as the Court suggests. As a matter of fact, they will probably be re-elected and put back into office, through the ignorance of the people, because they were never informed of their wrongdoing.

The appellate Court states that to be effective, the deterent must focus on the Municipal officials who have engaged in the prohibited discrimination. In this instance, *the City is its elected and appointed officials*. The officials are the ones that administrate the City for the community. When a conspiracy arises within the City itself to deny any person their Civil Rights guaranteed by United States Constitution, then each and every citizen should be made aware of those acts, and steps taken to punish the wrongdoers.

If the City of Anadarko were a private corporation and through it's agents, servants and employees, perpitrated these same acts against this same Plaintiff, then we would not be here now. It is well settled that punitive damages can and should be assessed against any private corporation that denies a person his Civil Rights. In this same vain, when a

private corporation is assessed with punitive damages said judgment is naturally passed to the innocent taxpayers.

Governmental immunity feeds the bacteria growing in our government. There are hundreds of cases under § 1983, (denial of Constitutional due process), where officials have been granted governmental immunity, for denial of Civil Rights. Are we restoring in our government the same misuses and oppression our Fore Fathers fled from in England.

One final point. The City is where it is in now, because its duly elected and appointed officials, in addition to conspiring to discriminate against Poolaw, *failed to follow its own laws*. Had the City appealed the decision of the Policeman's Board of Review to the District Court of Caddo County, then to the Supreme Court of Oklahoma, as clearly set out in the City Code, this case would not be before this Court at this time. Furthermore, the poor taxpayers would not have to carry the burden of the City's high priced attorneys fees, *to defend itself for its own intentional and wrongful acts*.

Therefore, based on the foregoing, and in special circumstances, Poolaw believes that punitive damages should properly be awarded against a City.

III. CERTIORARI SHOULD BE GRANTED REVERSING APPELLATE COURT'S DENIAL OF A REASONABLE FEE TO SUCCESSFUL PLAINTIFF

Grover Miskovsky, lead counsel in this case, undertook representation of Mr. Poolaw, on his Title VII, his § 1981 and his § 1983 claims, in October of 1978. John Constantikes, associate counsel, to Mr. Miskovsky, entered the case in March of 1981. The hearing on attorneys fees was held on May 28, 1982. Mr. Miskovsky was in the case, to that

point approximately 3¾ years. Mr. Constantikes was in the case to that point approximately 1 year and 2 months.[50]

During the hearing on attorneys fees, Mr. Constantikes submitted to the Court, his daily time records, from March of 1981 to May 27, 1982. These hours amounted to *387.00 total hours, for 1 year and 2 months*, and were well received by the Court. Mr. Constantikes was even complimented on his daily time records.[51]

Mr. Miskovsky then submitted to the Court his partially reconstructed time records, from October of 1978, to May 27, 1982. These hours amounted to *414.45 total hours, for a period in excess of 3 years.*[52] The Court criticized Mr. Miskovsky, vehemently, regarding his time records, and even went so far as to have him investigated by the FBI.

Taken solely in the light of the daily time records kept by Mr. Constantikes, who was only in the case for 1 year and 2 months, Mr. Miskovsky was claiming only *27.45 more hours* for a period well in excess of two years.

During the almost 2½ years Mr. Miskovsky was in this case, prior to Mr. Constantikes entering this case, this case had been filed, dismissed, and appealed for the first time to the Tenth Circuit Court of Appeals in Denver. Also, a close scrutiny of the time records of Mr. Constantikes will show how many times, both Mr. Constantikes and Mr. Miskovsky, worked together jointly on this case, in a combined effort to bring about a favorable disposition for Bruce Poolaw.

Furthermore, this case was on basically new grounds, which at the time (1979) had not been used as frequently as

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[50]May 28, 1982, Hearing

[51]p. 8 1.8

[52]p. 11 and p. 19

they seem to be now. Hours of research went into the case prior to filing the original action in the United States District Court for the Western District of Oklahoma.

Plaintiff's counsels jointly presented evidence of having expended a combined time of 801.45 total hours. This amount was anything but exaggerated.[53]

As aforementioned, Mr. Miskovsky, solely handled everything from the filing of the initial complaint through and including the first Appeal to the Tenth Circuit. For his time spent during the time from *October 1978 to April 1980, 1½ years, he logged a little over 200 hours.*

Then for the time spent from October 16, 1981, following the successful appeal, through extensive discovery proceedings, a four day trial, and the two hearings which followed the trial, *Mr. Miskovsky logged approximately 270 hours, for a 1½ year period.*

Again, Mr. Constantikes, keeping daily time records, for a 1 year, 2 month period, claimed 387 hours.

While Mr. Miskovsky understands that in cases of this nature the better practice is to keep daily time records. But as Mr. Miskovsky explained to the Court, his practice is basically comprised of Divorce, Personal Injury, Worker's Compensation, and Criminal Defense. With the exception of rare cases, such as this one, Mr. Miskovsky sets his fee up front on a per case basis. It is very difficult, when you are not in the habit to remember to write down every detail on a daily basis regarding a certain case. As Mr. Miskovsky testified, part of his time records were made on a daily basis and part were on a reconstructed basis.[54]

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[53]p. 21 and p. 10

[54]*King v. Greenhlatt*, 560 F. 2d 1024 (1977) Cert. den. 438 and *Bradford v. Blum*, 507 F. Supp. 526 (D.C. N.Y., 1981)

As can be clearly seen from the comparison of Mr. Constantikes records to those of Mr. Miskovsky's, the only person hurt by his not having kept perfect, daily records was Mr. Miskovsky. Otherwise, he probably could have logged every bit as many hours as Mr. Constantikes, so that for his 1½ year period, rather than only logging 270 hours, he could have logged closer to 370 hours. That's a 100 hour difference, and based on a minimum fee of $100.00 per hour that alone amounts to $10,000.00.

Mr. Miskovsky and Mr. Constantikes submitted combined total hours of 801.45. The Court awarded Mr. Miskovsky and Mr. Constantikes a combined total fee of $20,000.00. This comes to just a little over $24.00 per hour. There is not a reputable law firm in Oklahoma City, who would be willing to undertake a case of this nature at that hourly rate. As Defendants testified they received that much just for the trial.

The Appellate Court in it's decision agreed with the Trial Court that the fee was fair based upon the damages awarded. However, the ultimate guidelines set forth in determining a reasonable fee[55] is as follows:

1. Time and labor required.
2. The novelty and difficulty of the questions.
3. The skill requisite to perform the legal service properly.
4. The preclusion of other employment by the attorney due to acceptance of the case.
5. The customary fee.

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[55]*National Association of Req. Med. Prog., Inc. v. Weinberger*, 396, F. Supp. 842 (1975)

6. Whether the fee is fixed or contingent.
7. Time limitations imposed by the client or the circumstances.
8. The amount involved and the results obtained.
9. The experience, reputation and abilities of the attorneys.
10. The undesirability of the case.
11. The nature and length of the professional relationship with the client.
12. Awards in similar cases.

Mr. Miskovsky through testimony and evidence presented at the May 28, 1982 hearing, when not precluded by the Court, met the burden of each and every one of these guidelines.

The awarding of Attorney's Fees in Civil Rights discrimination cases has been upheld, and in fact, found to be a furtherance of the goals established by Congress, namely the facilitation of the bringing of Civil Rights discrimination complaints to the Courts for redress.[56]

The awarding of the fee is usually justified inasmuch as the Plaintiff is the chosen instrument of Congress to vindicate "a policy that Congress considered of the highest priority," and that an award of Attorney's Fees is against a party that has violated Federal Laws.[57]

In addition to the foregoing, Mr. Miskovsky has had to fight the Judge's chastizing and castigating remarks against him throughout these proceedings, and this is his third

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[56]*New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980)

[57]*Newman v. Piggie Park Enterprises*, 390 U.S. 400

appeal in an effort to right the wrongs perpitrated against Bruce Poolaw.

The Appellate Court and the Trial Court made reference to the fact that $20,000.00 was a fair fee based on the award given Plaintiff. First of all, attorney's fees have nothing to do with awards to Plaintiffs. But should be based upon the guidelines set out in *National Association, supra*. Secondly, the Trial Court constantly criticized Mr. Miskovsky's work. However, the pleadings, briefs, depositions and the jury verdict speak for themselves.

It must be remembered that Plaintiff was awarded a total judgment of $51,004.00, even though the Judge later struck $40,000.00 from the jury verdict, and by the Court's wrongful dismissal of Poolaw's Title VII claim, he was further denied those damages.

At the very least, Plaintiff's attorneys should have been awarded a fee based upon the hours presented, at the minimum rate of $100.00 or a total fee of $80,000.00. However Poolaw asserts that because of the appeals which have been necessary for him to receive what he has received to date by judgment, these appeals have been necessary. Furthermore, Poolaw was required to defend against the cross-appeal of Defendants, in trying to strike his actual damage award. Therefore, Poolaw does not believe the sum of $121,000.00 to be an excessive amount for his attorney's fees.

In a sense, Poolaw and all persons seeking redress for the intentional and wrongful acts, of governments and their officials, are burdened with yet another *denial of equal protection under the law*, by unrealistic, unfair and dismally low attorney fee allowances, to the pro bono publico representative. If a fair and reasonable attorney's fee is not granted, based on all factors set out herein above, rather

than just one time record issue, the impact on *future members of a discriminated class* will be that no attorney will be willing to represent them, as they can not afford it.

CONCLUSION

In conclusion, Poolaw respectfully prays this Court for a Writ of Certiorari be granted, and in accordance therewith Petitioner's Title VII claim be remanded for trial; that Petitioner's punitive damage award be reinstated; and that this Court grant Petitioner a reasonable attorney's fee allowance, based on the hours submitted by both counsels and at fair hourly rate.

Respectfully submitted,

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Oklahoma City, Oklahoma 73118
(405) 848-5455

APPENDIX

APPENDIX

Appendix A
PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 82-1760
and 82-1854

BRUCE POOLAW,

Plaintiff-Appellant,
Cross-Appellee,

v.

CITY OF ANADARKO, OKLAHOMA; THE MAYOR OF ANADARKO, CLARK MCCASKEL; THE CITY MANAGER, ROYCE HUNTER; THE FORMER ACTING CHIEF OF POLICE, J. C. GIVENS; THE FORMER ACTING CITY MANAGERS, BOB WILKERSON AND RON MADISON,

Defendants-Appellees.
Cross-Appellants.

FILED
United States Court of Appeals
Tenth Circuit
June 27, 1984
HOWARD K. PHILLIPS
Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. CIVIL NO. 79-817-E)

American Indian brought suit against city and various present and former city officials alleging that he was intentionally

deprived of same employment rights and benefits accorded to Caucasians. The United States District Court for the Western District of Oklahoma, Luther B. Eubanks, J., dismissed complaint, and plaintiff appealed. The Court of Appeals, Seymour, Circuit Judge, 660 F.2d 459, reversed and remanded. On appeal after remand to the United States District Court for the Western District of Oklahoma, Luther B. Eubanks, J., the Court of Appeals, McWilliams, Circuit Judge, held that: (1) municipality could not be held liable for punitive damages in employment discrimination action brought under the Civil Rights Act of 1866; (2) trial court's conclusion that plaintiff failed to established municipality's liability under Title VII was not clearly erroneous; (3) jury award of $10,000 in actual damages was supported by record; and (4) trial court did not abuse its discretion in awarding $20,000 in attorney fees.

Affirmed.

Grover Miskovsky, Oklahoma City, Okl. (John Constantikes, Oklahoma City, Okl., with him on the brief), for plaintiff-appellant, cross-appellee.

Margaret McMorrow-Love, Oklahoma City, Okl. (Terry W. Tippens and Doneen Douglas Jones, Oklahoma City, Okl., with her on the brief), of Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Okl., for defendants-appellees, cross-appellants.

Before McWILLIAMS and LOGAN, Circuit Judges, and CAMPOS, District Judge.*

McWILIAMS, Circuit Judge.

Bruce Poolaw, an American Indian, was fired from his job as an Anadarko, Oklahoma, policeman. The Policeman Board of Review determined that there was insufficient evidence to justify the termination, but the city manager refused to reinstate him. Poolaw then brought suit against the City of Ana-

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*Honorable Santiago E. Campos, United States District Judge of the District of New Mexico, sitting by designation.

darko, its city manager and four other city officials, alleging that he had been discriminated against during the course of his employment, and was ultimately fired, on account of his race. Poolaw's claims were filed pursuant to 42 U.S.C. §§ 1981, and 1983 and 2000e–2000e–17 (Title VII) (1976 & Supp. V 1981).[1] On motion, the district court initially dismissed all three actions. On appeal, we reversed and remanded. *Poolaw v. City of Anadarko*, 660 F.2d 459 (10th Cir. 1981).

After remand, the case came on for trial. Because "there is no right to trial by jury in cases arising under Title VII[,]" *Lehman v. Nakshian*, 453 U.S. 156, 164, 101 S.Ct. 2698, 2703, 69 L.Ed.2d 548 (1981), the § 1981 and § 1983 claims were tried to a jury and the Title VII claim was heard by the presiding judge. The jury awarded Poolaw $10,000 actual damages and $40,000 punitive damages against the City of Anadarko on his § 1981 claim. It also awarded nominal damages against the city and two officials and $1000 punitive damages against the city manager on Poolaw's § 1983 claim.

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[1]42 U.S.C. § 1983 has its origin in the Civil Rights Act of 1871. It provides a remedy against any "person", including a municipality, who, under color of state law, violates the constitional rights of another. *See generally Monell v. Dep't of Social Services*, 463 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). 42 U.S.C. § 1981 was enacted five years earlier pursuant to the Civil Rights Act of 1866 and reenacted, after passage of the Fouteenth Amendment, in the Civil Rights Act of 1870. It was designed "to prohibit all racial descrimination, whether or not under color of law, with respect to the rights enumerated therein. . . ." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436, 88 S.Ct. 2186, 2201, 20 L.Ed.2d 1189 (1968), 42 U.S.C. § 2000e–2000e–17 is the codification of Title VII of the Civil Rights Act of 1964. Its purpose is "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147 (1974). *See generally* C. Antieau, *Federal Civil Rights Acts* (2d ed. 1980).

The district court, acting pursuant to post-trial motions, set aside the jury's award of punitive damages against the city, but declined to set aside any of the other awards. At the same time, the district court, sitting as the trier of the fact, dismissed Poolaw's Title VII claim. The court also held a hearing on the issue of attorney's fees and awarded $20,000 to Poolaw's lawyers. Poolaw and the City of Anadarko both appeal. We affirm.

Poolaw, in his appeal, No. 82–1760, complains as follows: (1) the district court erred in denying him relief under Title VII; (2) the district court erred in striking the jury's award of $40,000 in punitive damages on his § 1981 claim; and (3) the district court's award of $20,000 as attorney's fees was inadequate.

The City of Anadarko in its cross-appeal, No. 82–1854, complains that the district court erred in refusing to grant its motion for judgment notwithstanding the verdict as concerns the $10,000 in actual damages awarded to Poolaw on his § 1981 claim.

I. Punitive Damages Under § 1981

Perhaps the central issue in these appeals is whether a municipality such as the City of Anadarko is immune from punitive damages in connection with a claim based on § 1981. The district court held that it is immune, and we find no error. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) held that a municipality is immune from punitive damages in a claim brought under § 1983. The question here is whether the same rule should apply in a § 1981 action. The First Circuit, in *Heritage Homes of Attleboro, Inc. v. Seekonk Water District*, 670 F.2d 1 (1st Cir.), *cert. denied*, 457 U.S. 1120, 102 S.Ct. 2934, 73 L.Ed.2d 1333 (1982), has held that both history and policy support municipal immunity from punitive damages under § 1981. We are in accord with the result reached in *Heritage Homes*.

Poolaw has failed to persuade us, by reference to the legislative history or otherwise, that Congress intended to override the immunity from punitive damages that municipalities tradi-

tionally have enjoyed. *City of Newport*, 453 U.S. at 259–64, 101 S.Ct. at 2755–58; *Heritage Homes*, 670 F.2d at 3. Therefore, there remains a presumption of municipal immunity here. *See Pierson v. Ray*, 386 U.S. 547, 555, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967). Moreover, we believe that the policy arguments in favor of municipal immunity to punitive damages are valid as applied to both § 1983 and § 1981.

First, punitive damages are intended to punish wrongdoers rather than compensate victims. The wrongdoers in a § 1981 claim are the individuals who discriminated against the plaintiff on racial grounds. These *individuals* are the guilty parties who, under certain circumstances, deserve punishment. Awarding punitive damages against a municipality, on the other hand, "'punishes' only the taxpayers, who took no part in the commission of the tort. . . . Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *City of Newport*, 453 U.S. at 267, 101 S.Ct. at 2759.

Second, punitive damages are also intended to stop *future* wrongdoing. To be effective, the deterrent must focus on the municipal officials who have engaged in the prohibited discrimination. These officials probably will not be deterred simply by assessing punitive damages against their employer, the municipality.

Third, we agree with the First Circuit that the Supreme "Court's concern with not imposing huge financial burdens on municipalities is equally applicable to § 1981." *Heritage Homes*, 670 F.2d at 3 Juries, aware of the taxing power of municipalities, are apt to make "extremely large awards[,] which would not only strain local treasuries but might also curtail [municipal] services." *Id.*

For these reasons, we hold that municipalities cannot be held liable for punitive damages in § 1981 actions, and that the district court ruled correctly in disallowing Poolaw's award.[2]

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[2]Several other district courts have also reached this conclusion. See *Holly v. City of Naperville*, 571 F.Supp. 668 (N.D.Ill.1983); *Bell v. City of Milwaukee*, 536 F.Supp. 462 (E.D.Wis.1982); *Ferguson v. Jolet Mass Transit Dist.*, 526 F.Supp. 222 (N.D.Ill.1981).

II. The Title VII Claim

We now consider Poolaw's appeal on the dismissal of his Title VII claim. At the conslusion of Poolaw's case, the City moved for a judgment of acquittal. The district court denied the motion and thereby indicated that Poolaw had made a *prima facie* showing of disparate treatment based on race. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). The burden then shifted to the defendants, who tried to articulate "legitimate, non-discriminatory" reasons for Poolaw's discharge. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981) (footnote omitted). The City argues that it fired Poolaw because he lied on his employment application concerning a prior arrest and was unfit to be a police officer due to complaints received by the police department about other alleged misdeeds involving bogus checks and the failure to pay his debts.

Once the City of Anadarko and the individual defendants offered evidence tending to show valid reasons for Poolaw's firing, "the *McDonnell-Burdine* presumption actually dropped from the case, and the court was in a position to decide the ultimate factual issue, as the trial judge did here." *Whatley v. Skaggs Companies, Inc.*, 707 F.2d 1129, 1135–36 (10th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 528, 78 L.Ed.2d 314 (1983) (citing *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983)). Based on the entire record, the district court found that Poolaw had failed to establish the City of Anadarko's liability under Title VII.[3]

True testimony and the permissible inferences were conflicting, but the Supreme Court has recognized "that the question

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[3]We do not believe, as Poolaw contends, that the district judge improperly based his ruling on a remark made outside of the record by one of the jurors. We find it untenable to suppose that the trial judge would disregard four days of testimony and other evidence, admitted through proper channels at trial, in order to be swayed by a juror's extraneous comments.

facing triers of fact in discrimination cases is both sensitive and difficult. . . . There will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *Aikens*, 103 S.Ct. at 1482. Therefore, because the trial court's resolution of the matter was not clearly erroneous, we are not at liberty to disturb it. Fed.R.Civ.P. 52(a). *See Curry v. Oklahoma Gas & Electric Co.*, 730 F.2d 598, 602 (10th Cir.1984) ("clearly erroneous" standard applies to ultimate findings of fact in Title VII actions).

III. The City's Cross-Appeal

The City of Anadarko's cross-appeal challenges Poolaw's award of $10,000 in actual damages under § 1981. The City of Anadarko argues that there is no evidence of race discrimination to support the jury's award. Further, the City argues that the fact that the district court, sitting as the trier of fact on Poolaw's Title VII claim, found for the defendants *precludes* any award on Poolaw's § 1981 claim.

As to the first contention, we believe the jury's award is supported by the record, although, as indicated, the evidence of race discrimination was in conflict. As to the second contention, the fact that the district judge found for the defendants on Poolaw's Title VII claim does not require that the jury's § 1981 actual damages award be set aside. Title VII and § 1981 cover similar ground, but they are not mutually exclusive. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459, 95 S.Ct. 1716, 1719, 44 L.Ed.2d 295 (1975) (citation omitted). Moreover, although the district judge and the jury heard the same evidence in this case, it is not unheard of for separate fact-finders to reach opposite conclusions.[4] Therefore, we uphold Poolaw's award of actual damages under § 1981.

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[4]At the hearing on defendants' motion for judgment notwithstanding the verdict, the district judge stated that he did not believe that the City of Anadarko had discriminated against Poolaw because of his race. Rather, "the City did not afford him any due process [in firing him] . . . and that's [why] he won the case."

IV. Attorney's Fees

Finally, we find no abuse of discretion in the district court's award of $20,000 in attorney's fees, as authorized by 42 U.S.C. § 1988 (Supp. V 1981). Poolaw sought an allowance in excess of $120,000, and no doubt was disappointed in the allowance made. Be that as it may, we do not believe the award made by the district court was unreasonable in light of the unsatisfactory documentation of certain time spent on the case. *See Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983). The district court also found that the hourly rate charged was excessive and that the billable hours claimed were exaggerated. Further, Poolaw's success was of a limited nature. Besides the City of Anadarko, there were four other defendants.[5] Poolaw failed to make any recovery against two of them, and he made only nominal recovery in the sum of one dollar against a third. The Supreme Court has held that the degree of success obtained is "a crucial factor" in determining a proper attorney's fee under 42 U.S.C. § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 1943, 76 L.Ed.2d 40 (1983). We are not inclined to modify the district court's award of attorney's fees. That court saw "the attorney's work first hand," and could make the necessary judgments about that work better than we can now. *Higgins v. State ex rel. Oklahoma Employment Security Commission*. 642 F.2d 1199, 1203 (10th Cir. 1981).

Judgment affirmed in all respects.

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[5]Poolaw's cause of action against a fifth defendant was dismissed at the beginning of the trial.

Appendix B
NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77–1299

NICK DEBONO,

Plaintiff-Appellant,

v.

CHRISTOPHER VZIAS, INDIVIDUALLY AND AS CITY MANAGER FOR THE CITY OF TRINIDAD AND THE CITY OF TRINIDAD, COLORADO, A MUNICIPAL CORPORATION,

Defendants-Appellees.

No. 77–1300

JOSEPH MONTERA,

Plaintiff-Appellant,

v.

CHRISTOPHER VIZAS, INDIVIDUALLY AND AS CITY MANAGER FOR THE CITY OF TRINIDAD AND THE CITY OF TRINIDAD, COLORADO, A MUNICIPAL CORPORATION,

Defendants-Appellees.

FILED
United States Court of Appeals
Tenth Circuit
December 18, 1978
HOWARD K. PHILLIPS
Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. NOS. 76–F–1218 AND 77–F–213)

Bruce D. Pringle of Clark, Martin and Pringle, Denver, Colorado, for Plaintiffs-Appellants.

Earl S. Wylder (Stanley Ereckson, Jr., on the brief) of the firm of Leonard M. Chesler, Denver, Colorado, for Defendants-Appellees.

Before SETH and DOYLE, Circuit Judges, and STANLEY, Senior District Judge*.

*Of the District of Kansas, sitting by designation.

STANLEY, Senior District Judge.

Joseph Montera and Nick DeBono have each appealed from an order of the district court granting Appellees' motion to dismiss his complaint for failure to state a claim upon which relief could be granted. The cases were consolidated on appeal.

When a complaint is dismissed for failure to state a claim, it must appear beyond doubt that the plaintiff can prove no set of facts in support of this claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41; *Mitchell v. King*, 537 F.2d 385 (10th Cir. 1976). Further, a motion to dismiss under Rule 12(b) of the Fed.R.Civ.P. admits all well-pleaded facts in the complaint as distinguished from conclusory allegations, and all reasonable inferences therefrom must be indulged in favor of the plaintiff. *Jones v. Hopper*, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991; *Williams v. Eaton*, 443 F.2d 422 (10th Cir. 1971). In the cases presently before the court, the

parties are essentially in agreement regarding the relevant facts and the only issue before the court is a question of law.

The action was brought pursuant to 42 U.S.C. § 1983.

The occurrences giving rise to this suit were Appellants' suspensions and ultimate terminations of their positions in the Trinidad Police Department, Trinidad, Colorado, by the unilateral decision of the city manager, Christopher Vizas. Montera was chief of police and DeBono a sergeant in the Trinidad Police Department.

Each appellant maintains that the procedures employed by the city manager in effecting his suspension and termination violated his right to due process under the 14th Amendment. Each seeks reinstatement to his job and back pay.

Appellants alleged in their complaints that each received a letter from the city manager on or about October 5, 1976 advising him that he was suspended without pay effective at the close of business October 8, 1976. Both complain that they did not receive prior notice of the charges which formed the basis for the suspension, nor were they given an opportunity to respond. An administrative hearing was held on November 8, 1976, which apparently resulted in a mistrial and no further administrative proceedings were held.

Appellants filed suit on December 27, 1976 challenging the legality of the suspensions on the theory that they had been denied due process. Subsequent to the filing of this complaint, Appellants were each notified by letter that they were terminated from the Trinidad Police Department. A second amended complaint was then filed challenging the legality of the terminations under the 14th Amendment.

Montera was advised by letter dated January 19, 1977 that he was dismissed for the unauthorized removal of public records from the police department and magistrate court. A second ground for dismissal was the charge that on four occasions Montera in his official capacity had ordered firearms from a

firearms supply company and had sold these weapons to private individuals without keeping the records required by Colorado and federal law.

The letter notifying DeBono of his dismissal from the department was substantially the same. His termination was based on the charge that he had removed without authorization public records from the police department and the magistrate court and that he had on one occasion ordered a weapon, ostensibly for his use as a police officer, and had sold it to a private citizen without maintaining the record as required by Colorado and federal law.

Appellants have pursued a single issue on appeal—whether the Colorado statute, C.R.S § 31–4–211, which in part authorizes the removal of city officers and employees "for cause" itself creates a protected property interest, triggering the due process requirements of the 14th Amendment.

The statute provides in relevant part:

> Officers and employees appointed by the city manager may be removed by him at any time for cause. The decision of the city manager in any such case shall be final.

The statute further provides that all such appointments shall be without definite term.

I

In *Bishop v. Wood*, 426 U.S. 341, the Supreme Court addressed the precise issue presented in this case. In Bishop, a police officer, a permanent city employee, was terminated by the city manager on the recommendation of the chief of police. The employee brought suit in federal court claiming, among other things, that under state law he had a sufficient expectation of continued employment to constitute a protected property interest under the due process clause of the 14th Amendment. The trial court had granted summary judgment for the city manager based on its interpretation of state law that the officer held his employment at the "will and pleasure of the

city". The state statute provided that a permanent city employee might be discharged for failure to perform his work at the required standard for his classification, or if he is negligent, inefficient, or unfit to perform his duties. The Supreme Court affirmed, holding that the sufficiency of the claim of a property interest in employment must be decided by reference to state law, citing *Board of Regents v. Roth*, 408 U.S. 564, for the proposition that

> Property interests of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. 408 U.S. at 577.

Colorado case law dictates that the decision of the district court be affirmed. Trinidad is not a home-rule city, and its powers are conferred directly by the state. The Court of Appeals of Colorado in *City of Leadville v. Bishop*, 14 Colo. App. 517, 61 P. 58 (1900), *examined the power of a city council* to remove members of the police department. The court determined that the *city council had the power to remove policemen summarily*, stating:

> We find nothing in the statute and nothing in the ordinances of the defendant city which prescribed or fixed any term of office for a policeman. . . . The plaintiff was therefore not appointed for any specified term. In such case it is well settled that the power of removal is incident to the power of appointment, and that it may be exercised at the pleasure of the appointing power; that is to say, it may be arbitrarily exercised, without the assignment of any cause, without notice, and without hearing being accorded to the officer. The incumbent holds only during the pleasure of the appointing power. (Citations omitted.) Hence independent of any statutes specially granting such power, the city council of Leadville had the power to

> remove the plaintiff and discharge him at its pleasure, without notice to him, without charges being preferred, and without giving a hearing. 61 P. at 59.

The court went on to explain the reason behind the rule.

> It needs no argument to support the proposition that in municipal affairs it is essentially in the interest of good government that the council or other controlling power in a city should be invested with authority to summarily remove policemen. This power is more important with respect to these officers than to any other, because it is upon them that most largely depends the peace and good order of the community, the safety of property, and security of life. There may be, and it is a matter of common knowledge that there are, emergencies when, if it were necessary to present formal charges and have a judicial hearing and investigation before a policeman could be removed, the peace of the community might be greatly endangered, and serious consequences might follow. As a matter of public policy, therefore, we think that this summary power of removal should be invested in some department of the city government, and that such was the intent of the legislature in this instance. 61 P. at 60.

II

The statute presently in controversy provides that the employment termination decisions of the city manager in any case shall be final.

The Colorado Court of Appeals has also remarked on the significance of this aspect of the decision-making process. Restating the public policy considerations requiring the prompt and unfettered discretion of city officials in police employment decisions, the court in *Leadville* stated:

> In such cases it seems to us absurd to require that the council, which in any event has the ultimate power of removal must, before it can exercise this power, undergo

> the delay incident necessarily to the preferment of formal charges and a public trial and investigation. The council would in some instances be compelled to prefer charges to itself, and sit in judgment upon its own charges; it being all the time conceded that whatever might be its judgment, it would be final and conclusive, and could not be questioned, whatever the evidence upon which it is founded. Surely neither the legislature nor city counsel ever contemplated such farcical proceedings. 61 P. at 61.

Appellants have placed great emphasis on the "for cause" language contained in the statute. Somewhat similar legislative language has been interpreted by the Colorado Supreme Court in *Trimble v. People*, 19 Colo. 187, 34 P. 981 (1893), and related cases. In *Trimble*, the legislature had provided in the Denver City Charter that the governor was invested with the authority to remove the police and fire commissioners at any time for cause stated in writing, but not for political reasons. A police commissioner challenged his dismissal on the ground that he was entitled to a judicial determination that there was cause for his removal and that it was not for political reasons. The Colorado Supreme Court held that the governor had determined that a sufficient cause for removal existed, and having exercised the power confided in him, the police commissioner was without a remedy in the courts.

The Colorado Supreme Court in *People v. Martin*, 19 Colo. 565, 36 P. 543 (1894), had occasion to re-examine the legislative provision that had been considered in *Trimble*, and expressly approved that case.

> The opinion in the Trimble case is authority, also, for the doctrine that the sufficiency of the cause of the removal is a matter to be determined by the governor, and that the cause need not be such as would have weight with the courts; in short, the governor is at liberty to remove for any cause to which he gives the sanction of his name in

writing, provided such removal is not made for political reasons. 36 P. at 546–547.

The Supreme Court in *Martin* again stressed the strong public policy to be served by allowing summary dismissals of members of municipal police departments—the peace and order of the community and the security of life and property. *City of Leadville v. Bishop, supra.*

The district court correctly held that the provisions of C.R.S. § 31–4–211 do not create a protectible property interest under the due process clause of the 14th Amendment and the judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

No. 79–2304.

BRUCE POOLAW,

Plaintiff-Appellant,

V.

THE CITY OF ANADARKO, OKLAHOMA; THE MAYOR OF ANADARKO, CLARK MCCASKEL; THE CITY MANAGER, ROYCE HUNTER; THE FORMER ACTING CHIEF OF POLICE, J.C. GIVENS; THE FORMER ACTING CITY MANAGERS, BOB WILKERSON AND RON MADISON,

Defendants-Appellees.

Argued March 19, 1981
Decided Sept. 25, 1981.

American Indian brought suit against the city and various present and former city officials alleging that he was intentionally deprived of the same employment rights and benefits accorded to caucasians. The United States District Court for the Western District of Oklahoma, Luther B. Eubanks, J., dismissed the complaint, and plaintiff appealed. The Court of Appeals, Seymour, Circuit Judge, held that: (1) plaintiff stated claim under Sections 1981 and 1983 regardless of whether he had a property interest in his public employment, and (2) time period within which policeman was required to file EEOC charge, in which he alleged that city discriminatorily refused to reinstate him following review board's finding that his discharge was improper when a caucasian employee was reinstated after his favorable decision on that same day, did not commence before decision of the review board.

Reversed and remanded.

Before DOYLE, LOGAN, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

Bruce Poolaw, an American Indian, sued the City of Anadarko, its City Manager, and various other present or former city officials pursuant to 42 U.S.C. §§ 1981, 1983, and 2000e *et seq.* (Title VII). The trial court dismissed the causes of action alleged under sections 1981 and 1983 for failure to state a claim upon which relief could be granted, and dismissed the Title VII cause of action for failure to file a timely charge. Poolaw appeals and we reverse.

I.

BACKGROUND

Upon review of the trial court's order of dismissal, we must assume that the facts alleged in the complaint are true. *Bryan v. Stillwater Board of Realtors*, 578 F.2d 1319, 1321 (10th Cir. 1977); *Dewell v. Lawson*, 489 F.2d 877, 879 (10th Cir. 1974). We may sustain dismissal only if it appears beyond doubt that Poolaw can prove no set of facts entitling him to relief on his claims. *Conley v. Gibson*, 355 U.S. 41, 45, 46, 78 S. Ct. 99, 101 2, 2 L.Ed.2d 80 (1957), *Bryan*, 578 F.2d at 1321.

In his amended complaint. Poolaw alleges under 42 U.S.C. § 1981 and Title VII that because of his race defendants intentionally deprived him of the same employment rights and benefits accorded to Caucasians. The alleged improper practices include discriminatory job classifications, promotional practices, and rates of pay. Poolaw also alleges that he was fired without cause and that he was not reinstated by the City after a review board found his discharge to be improper. Poolaw claims this failure to reinstate following the review board's finding was racially discriminatory because a Caucasian police officer was reinstated under similar circumstances.

In his section 1983 cause of action, Poolaw alleges that he was denied both equal protection and due process of law by the official conduct of defendants. In support of his equal protection

allegation, Poolaw charges the City with essentially the same discriminatory conduct noted above. His due process claim allegedly arises from his termination and from the City's failure to reinstate him following the finding of the review board.

At the hearing on defendants' motion to dismiss, the trial court orally concluded that Poolaw had no property interest in his employment with the City and that he had therefore failed to state a claim for relief under either section 1981 or 1983. As to the Title VII claim, the trial court held that the 180-day period within which Poolaw was required to file his Title VII claim with the EEOC began to run on the date of his discharge. The court dismissed the Title VII claim because Poolaw failed to file within this period.

II.

THE SECTION 1981 CLAIM

The Supreme Court has noted that although section 1981[1] "on its face relates primarily to racial discrimination in the making and enforcement of contracts," *Johnson v. Railway Express Agency*, 421 U.S. 454, 459, 95 S. Ct. 1716, 1719, 44 L.Ed.2d 295 (1975), the statute provides a remedy against employment discrimination on the basis of race. *Id.* at 459–60, 95 S.Ct. at 1719–20. Grounded as it is on the Thirteenth Amendment, section 1981 protects employees from racial discrimination in both the public and private sectors. *See Garner v. Giarrusso*, 571 F.2d 1330, 1338 (5th Cir. 1978).

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[1]42 U.S.C.§ 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens,and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The dismissal order itself gives no reason why the trial court concluded that Poolaw failed to state a claim under section 1981. However, at the hearing on the issue, the judge stated that he was sustaining defendants' motion to dismiss the section 1981 cause of action because he concluded that Poolaw did not have a property interest in his employment.

Neither the trial court nor the defendants have cited any case holding that a plaintiff who alleges intentional employment discrimination based on race fails to state a claim under section 1981 unless he has a property interest in his job. On the contrary, section 1981 has been held to provide relief for a discriminatory refusal to hire, a situation in which a property interest in any job is clearly absent. *See, e.g., Ramirez v. Sloss*, 615 F.2d 163 (5th Cir. 1980); *Sabol v. Snyder*, 524 F.2d 1009 (10th Cir. 1975); *Faraca v. Clements*, 506 F.2d 956, 958 (5th Cir. 1975). While the existence of a property interest is critical to the issue of whether a plaintiff may invoke constitutional due process guarantees pursuant to 42 U.S.C. § 1983, see part II *infra*, it is simply irrelevant to a claim of denial of equal employment because of race under section 1981.

Poolaw has alleged numerous acts of purposeful employment discrimination by defendants on account of his race. Such allegations state a claim for relief pursuant to section 1981. *See, e.g., Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979); *Chicano Police Officers Association v. Stover*, 552 F.2d 918 (10th Cir. 1977).

III.
THE SECTION 1983 CLAIMS

In his claim for relief under section 1983,[2] Poolaw alleges that defendants denied him both equal protection and due process

[2]42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress."

under color of state law. As with the section 1981 claim, the sole reason appearing anywhere in the record for the dismissal of the section 1983 claim is the trial court's conclusion that Poolaw had no property interest in his employment.

A. Denial of Equal Protection

Section 1983 provides a remedy for state action that purposefully discriminates on the basis of race in violation of the equal protection clause of the Fourteenth Amendment. *See, e.g., Flores v. Pierce*, 617 F.2d 1386, 1388 (9th Cir. 1980). The protection afforded by section 1983 includes relief from discriminatory employment practices of public employers. *See Whiting v. Jackson State University*, 616 F.2d 116, 121 22 (5th Cir. 1980). Thus, the constitutional right to equal protection with regard to public employment does not depend on the existence of a property interest in that employment.

A claim made under section 1983 that the state has impermissibly discriminated on the basis of race and thereby denied a plaintiff equal protection is not to be confused with a claim that the state has deprived a plaintiff of a liberty or property interest without due process of law. *See id.; Harris v. Harvey*, 605 F.2d 330, 338 (7th Cir. 1979). Here Poolaw has asserted that defendants denied him equal protection on the basis of race. The allegations of discriminatory employment practices which are sufficient to support Poolaw's claim for relief under section 1981 are also sufficient to withstand a motion to dismiss his equal protection claim under section 1983. *See Whiting*, 616 F.2d at 121 22

B. Denial of Due Process

We now turn to Poolaw's allegation under section 1983 that defendants deprived him of a property interest without due process of law. As a preliminary matter, we note that the trial judge considered provisions of the Anadarko municipal charter, material outside the pleadings, in assessing defendants' motion to dismiss this claim. Under Fed.R.Civ.P. 12(b), the motion is to be treated as one for summary judgment.

The relevant city charter provisions state that no policeman may be discharged without cause, and that a discharged policeman may appeal his case to a board of review. The charter further provides that the decision of the review board may be appealed to the state district court and thereafter to the state supreme court, and that the decision of the state supreme court shall be final.

In making its determination that the above provisions did not create a property interest in employment, the trial court relied on the consolidated cases of *DeBono v. Vizas* and *Montera v. Vizas*, Nos. 77 1299, 77 1300 (10th Cir. Dec. 18, 1978), and on the case of *Abeyta v. Town of Taos*, 499 F.2d 323 (10th Cir. 1974). However, those cases are factually distinguishable from the instant situation and do not support the decision below.

In *De Bono* and *Montera*, the issue was whether the relevant Colorado statute created a protected property interest in certain city jobs. The statute stated that employees appointed by the city manager could be removed by him for cause, and that the decision of the city manager in such a case would be final. We found it significant that the final decision as to what constituted cause rested with the city manager. Because the statute in essence vested unfettered discretion in the city manager with regard to police employment decisions, we held that no property interest was created.

Here, to the contrary, the final decision as to whether a discharge is supported by cause does not rest with the city official who discharges the employee. The Anadarko municipal charter provides an appeal to the review board and then through the state court system. The charter expressly states that the decision of the state supreme court shall be final. Thus the discretion of the Anadarko city manager is subject to review both by the board and the courts, a circumstance not present in the *DeBono* and *Montera* cases.

In *Abeyta v. Town of Taos*, 499 F.2d 323, there was no statutory limitation on discharge from employment, and no

procedure required by which a discharge decision could be reviewed. Upon those facts, we held that under Colorado law the plaintiffs had no protected property interest. *Abeyta* presented this court with a set of circumstances readily distinguishable from the case now before us.

We must look to the state law of Oklahoma in assessing whether the Anadarko ordinances create a property interest in employment. *See Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976). The touchstone in our analysis is whether Poolaw has a "legitimate claim of entitlement" to his position. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). The Oklahoma Supreme Court has recognized that "the terms of employment established by an employer . . . may create a sufficient expectancy of continued employment to constitute a property interest, which must be afforded constitutionally guaranteed due process" *Hall v. O'Keefe*, 617 P.2d 196, 200 (Okla. 1980).

Here the city charter specifically states that a policeman may not be discharged without cause. The charter further provides that the determination of cause is not a matter solely within the discretion of the employer. If review of termination is sought, the administrative and judicial procedures established provide an independent, objective and final decision on the issue of cause. These procedures are clearly sufficient to give Poolaw a legitimate expectation that his employment will continue absent cause for discharge.

In so concluding, we have considered the decision in *Umholtz v. City of Tulsa*, 565 P.2d 15 (Okla. 1977), cited by the court in *Hall v. O'Keefe*, 617 P.2d at 200. In *Umholtz*, the relevant city charter provided that city employees could only be discharged for cause. The court stated that "[t]his language taken alone would clearly confer a property right in continued employment." 565 P.2d at 23. The charter also provided only for post-termination administrative review by the city commission. Based on its reading of *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974), the court concluded that the

charter created a property right "*defined* and *limited by* the procedural language of the provision." 565 P.2d at 24 (emphasis in original), and that as a matter of law such a limited property right was not sufficient to invoke the due process clause of the Fourteenth Amendment. The decision in *Arnett*, however, does not support this latter conclusion. The Court in *Arnett* determined that such a property interest *is* subject to the due process guarantees of the Fourteenth Amendment. As the Court subsequently made clear in *Bishop v. Wood*, 426 U.S. 341, 345 n.8, 96 S.Ct. 2074, 2077 n.8, 48 L.Ed.2d 684 (1976), the *Arnett* Court concluded "that because the employee could only be discharged for cause, he had a property interest which was entitled to constitutional protection."

Moreover, the statutory provisions in *Umholtz* relevant to the creation of an expectation of continued employment were not as broad as those in the instant case. The Anadarko city charter provides for both administrative *and* judicial review of a finding of cause for termination. Under these circumstances, we believe the Oklahoma Supreme Court would find a property interest in continued employment protected by the Fourteenth Amendment. *See Perry v. Sindermann*, 408 U.S. 593 601–03, 92 S.Ct. 2694, 2699 700, 33 L.Ed.2d 570 (1972).

We express no opinion on whether the post-termination procedures provided in the Anadarko city charter satisfy the due process requirements of the Fourteenth Amendment, nor whether it was a violation of Poolaw's due process rights to refuse to reinstate him after the administrative review board held that he was terminated without cause. The decision as to what process is due and whether it was provided is best left in the first instance to the trial court after full development of the relevant facts.

IV.

THE TITLE VII CLAIM

Poolaw was fired from his job as a patrolman in January 1978. He appealed his discharge to the Policeman's Board of Review,

which found in his favor on August 8, 1978. Following that decision, defendants refused to reinstate Poolaw. He filed an employment discrimination charge with the EEOC on November 20, 1978.

An EEOC complaint must be filed "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e–5(e). Poolaw's EEOC charge was not filed within 180 days of his discharge in January 1978. However, it was filed within 180 days of defendants' refusal to reinstate him after the favorable decision of the review board.

The trial court held that Poolaw's charge was not timely filed because the 180–day period began to run upon the date of his discharge, basing its decision upon *Electrical, Radio & Machine Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976). In *Eectrical Workers*, petitioner filed a grievance pursuant to a collective bargaining agreement between her union and her employer after she was terminated. The grievance proceedings were resolved against her, and she filed a charge with the EEOC. After receiving a "right to sue" letter, she filed suit under Title VII alleging that the company had discharged her because of her race. Her EEOC filing would have been timely if the statutory period began to run on the day the grievance procedures were terminated, but untimely if the period began on the day of discharge. The Supreme Court held that the period commenced on the day of discharge and that it was not tolled during the pendency of the grievance proceeding.

In determining whether an EEOC complaint is timely filed, the unlawful employment practice complained of must be precisely identified. *See Delaware State College v. Ricks*, 449 U.S. 250, 258, 101 S.Ct. 498, 504, 66 L.Ed.2d 431, 439 (1980). In *Electrical Workers*, the petitioner did not allege in her Title VII suit that the grievance proceedings themselves constituted acts of unlawful discrimination. Here, however, Poolaw alleges "[t]hat irrespective of the ruling by the Board on August 8, 1978, the Defendants . . . refused to reinstate the Plaintiff.

However, a caucasian employee was reinstated by said Department, after his favorable decision on that same day." Rec., vol. I, at 49. Poolaw's allegation that his post-termination treatment was discriminatory is a claim separate and distinct from his allegation of discriminatory discharge. The 180-day period within which he was required to file his reinstatement claim began to run at the time that alleged violation actually occurred. *See Delaware State College*, 449 U.S. at 259, 101 S.Ct. at 504–5, 66 L.Ed.2d at 439–40. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 59, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977). That period necessarily could not commence before the decision of the review board on August 8, 1978. Poolaw's EEOC charge was filed on November 20, 1978. Accordingly, we hold that his claim of discriminatory refusal to reinstate was timely filed. The order dismissing that portion of his Title VII claim is reversed.

This case is reversed and remanded for further proceedings consistent with this opinion.

Editor's Note: The opinion of the United States Court of Appeals, Tenth Circuit in *Crisp v. Mayabb* published at this citation, 660 F.2d 465–474, was withdrawn from bound volume to be republished together with the opinion on rehearing.

Appendix C

42 U.S.C. § 1981

Against Yes or No		Actual or Nominal Damages	Punitive Damages
Yes	CITY OF ANADARKO, OKLAHOMA	$10,000.00	$40,000.00
No	ROYCE HUNTER	$	$
No	J.C. GIVENS	$	$
No	BOB WILKERSON	$	$
No	RON MADISON	$	$

42 U.S.C.§ 1983

DUE PROCESS CLAIM

Against Yes or No		Actual or Nominal Damages	Punitive Damages
Yes	CITY OF ANADARKO	$1.00	$None
Yes	ROYCE HUNTER	$1.00	$1,000.00
No	J.C. GIVENS	$	$
No	BOB WILKERSON	$	$
Yes	RON MADISON	$1.00	$None

EQUAL PROTECTION CLAIM

Against Yes or No		Actual or Nominal Damages	Punitive Damages
Yes	CITY OF ANADARKO	$1.00	$None
No	ROYCE HUNTER	$	$
No	J.C. GIVENS	$	$
No	BOB WILKERSON	$	$
No	RON MADISON	$	$

The Court found that it had jurisdiction of this matter and accepted and received the verdict and reserved the entry of judgment following thereon until the defendants request that they be granted leave to file a Motion for Judgment Notwithstanding

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-79-817-E

BRUCE POOLAW,

Plaintiff,

VS.

CITY OF ANADARKO, OKLAHOMA; THE CITY MANAGER, ROYCE HUNTER; THE FORMER ACTING CHIEF OF POLICE, J.C. GIVENS; THE FORMER ACTING CITY MANAGERS, BOB WILKERSON AND RON MADISON,

Defendants.

FILED
May 28, 1982
HERBERT T. HOPE
Clerk, U.S. District Court Deputy

JOURNAL ENTRY OF JUDGMENT

The above-entitled and numbered cause was called for trial on April 13, 1982, pursuant to its regular setting, and the parties appeared in person and by and through their personal representatives as well as their respective attorneys and counsel. A jury was selected and sworn. The Court upon oral motion by counsel for defendant, Clark McCaskill, and as agreed to by plaintiff, dismissed Clark McCaskill as a party defendant in this matter. Plaintiff began introducing evidence and testimony, the case being continued from day to day thereafter. Plaintiff rested and defendant introduced evidence and testimony and rested. Both sides then closed their evidence and

presented closing arguments. On April 16, 1982, the jury heard and considered the instructions of the Trial Court and then retired, in the custody of the bailiff, to deliberate. On that same day, the jury returned the following verdict, by their unanimous vote, as follows, omitting the caption:

WE, the jury, find in favor of the Plaintiff, Bruce Poolaw, and against such defendants as are hereinafter indicated and fix the amount of plaintiff's recovery against each as follows:

42 U.S.C. § 1981

Against Yes or No		Actual or Nominal Damages	Punitive Damages
Yes	CITY OF ANADARKO, OKLAHOMA	$10,000.00	$40,000.00
No	ROYCE HUNTER	$_____	$_____
No	J.C. GIVENS	$_____	$_____
No	BOB WILKERSON	$_____	$_____
No	RON MADISON	$_____	$_____

42 U.S.C.§ 1983

DUE PROCESS CLAIM

Against Yes or No		Actual or Nominal Damages	Punitive Damages
Yes	CITY OF ANADARKO	$1.00	$None
Yes	ROYCE HUNTER	$1.00	$1,000.00
No	J.C. GIVENS	$_____	$_____
No	BOB WILKERSON	$_____	$_____
Yes	RON MADISON	$1.00	$None

EQUAL PROTECTION CLAIM

Against Yes or No	Actual or Nominal Damages	Punitive Damages
Yes CITY OF ANADARKO	$1.00	$None
No ROYCE HUNTER	$	$
No J.C. GIVENS	$	$
No BOB WILKERSON	$	$
No RON MADISON	$	$

The Court found that it had jurisdiction of this matter and accepted and received the verdict and reserved the entry of judgment following thereon until the defendants request that they be granted leave to file a Motion for Judgment Notwithstanding the Verdict or in the Alternative a Motion for New Trial and until a reasonable attorneys fee to be awarded the plaintiff under 42 U.S.C. § 1968 was decided. The Court reserved decision of the Title VII claims. The defendant thereafter filed a Motion for Judgment Notwithstanding the Verdict and a Motion for New Trial or, in the Alternative, a Remittitur and a Motion to Deny Title VII Claims. The plaintiff responded to the Motions by brief filed with the Clerk of the Court.

On May 27, 1982, the Court heard argument by the plaintiff and defendants on the Motion for Judgment Notwithstanding the Verdict, Motion for New Trial and Motion to Deny Title VII Claims. The Court having heard the oral argument of counsel and having read the briefs of plaintiff and defendants, ordered that the Motion for Judgment Notwithstanding the Verdict be sustained as a matter of law in regard to the punitive damages awarded under 42 U.S.C. § 1981 against the City of Anadarko and ordered that the $40,000.00 punitive damage award against the City of Anadarko be stricken from the verdict of the jury. The Court overruled the Judgment Notwithstanding the Verdict directed toward striking the $10,000.00 actual damages awarded against the City of Anadarko under 42

U.S.C. § 1981 and the $1,000.00 punitive damages assessed against Royce Hunter under 42 U.S.C. § 1983. The Court overruled the Motion for New Trial on all grounds presented therein. The Court also heard the Motion to Deny Title VII Claims and found under 42 U.S.C. § 2000(e) et seq. for the defendants, City of Anadarko, Royce Hunter, J.C. Givens, Bob Wilkerson, and Ron Madison and against the plaintiff.

On May 28, 1982, the plaintiff and defendant put on evidence as to attorney fees and the Court finds that a reasonable attorney fee would be $20,000.00.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that plaintiff, Bruce Poolaw, have and recover judgment from and against defendant, City of Anadarko, in the principal amount of Ten Thousand Two and no/100 Dollars ($10,002.00) plus interest at the statutory rate, against defendant Royce Hunter in the amount of One and no/100 Dollar ($1.00) for nominal damages and in the amount of One Thousand and no/100 Dollars ($1,000.00) for punitive damages plus interest at the statutory rates, and against defendant Ron Madison, in the principal amount of One and no/100 Dollar ($1.00) plus interest at the rate of twelve percent (12%) per annum plus attorney fees in the amount of $20,000.00 plus court costs in the amount of $____.

Judgment entered this 28th day of May, 1982.

_____

United States District Judge

Appendix E
CHARTER OF THE CITY OF ANADARKO, CADDO COUNTY, OKLAHOMA

PREAMBLE

We, the people of the City of Anadarko, Oklahoma, in order to enjoy the full benefit of home rule, do ordain and establish this charter for the City of Anadarko.

ARTICLE I
BOUNDARIES

Section 1. The municipal corporation, now existing and known as the City of Anadarko, Caddo County, Oklahoma, shall remain and continue to be a body politic and corporate and under the same name. The boundaries of said city, and the respective wards thereof, shall until altered as otherwise provided by law, be the same as at the time of the adoption of this charter.

ARTICLE II
CORPORATE POWERS, RIGHTS AND LIABILITIES

Section 1. The City of Anadarko shall have perpetual succession and shall own, possess and hold all property, real and personal, heretofore owned, possessed or held by the said City of Anadarko and shall assume, manage and dispose of all trusts in any way connected therewith.

Section 2. It shall succeed to all all the property rights and liabilities and shall acquire all benefits, and shall assume and pay all bonds, legal obligations, and indebtedness of said City of Anadarko, and by that name sue and be sued, contract and be contracted with, plead and be impleaded, intervene, prosecute and defend, in 11 courts and in all matters and proceedings; and shall have power to acquire property, real or personal, by

purchase or otherwise, within or outside the city limits, necessary for the public good, and to own, hold, sell, lease, convey or otherwise dispose of any real or personal property, within or outside of the city limits; may have and use a common seal and alter the same at pleasure.

Section 3. Said city may receive bequests, gifts and donations of all kinds of property in fee simple, or in trust, for public charitable or other purposes and do all things and acts necessary to carry out the purposes of such gifts, bequests and notions

Appendix F
ANADARKO CITY CODE, 1975

CHANGE NO. 1, JULY 20, 1978

To whom it may concern:

Change No. 1 to the Anadarko City Code, 1978, contains all ordinances and parts of ordinances of a permanent and general nature passed during the period July 1, 1975 through July 1, 1978, and still in effect on July 1, 1978. No charter amendments were made during this period. A copy of Change No. 1 is attached hereto.

Insert Change No. 1 in the Code by removing obsolete pages from the Code and inserting the new pages of this Change in the Code, as follows:

Obsolete pages to be removed		New pages to be inserted
Old title page		New title page
1–5 thru 1–8		1–5 thru 1–8
1–25 and 1–26		1–25 thru 1–28
4–3 thru 4–16		4–3 thru 4–16
8–1 and 8–2		8–1 and 8–2
16–1 and 16–2		16–1 and 16–2
20–33 and 20–34		20–33 and 20–34
22–1 and 22–2		22–1 and 22–2
29–1 and 29–2	Index	29–1 and 29–2

When a copy of Change No. 1 is thus inserted into a copy of the Code, the Code will be up-to-date through July 1, 1978.

J.D. Cheek Director
Office of Urban & Community
Development
University of Oklahoma
Tulsa, Oklahoma

§ 1–59 will constitute grounds for prompt dismissal or disciplinary action by either the department head or the city manager.

(8) Injuries connected with work in the city service shall not be charged against sick leave. No paid sick leave shall be allowed for an injury incurred while working for another employer.

(9) An employee, while on sick leave, shall be paid his regular salary, or rate of pay, decreased each pay period by any insurance benefits paid for in whole or in part by the city and received or to be received by such employee.

Sec. 1–59. City employees injured on the job to receive salary; qualifications.

An employee injured on the job shall continue to receive his regular salary or rate of pay during his absence from work, as approved by his department head and the city manager, but not to exceed a period of six (6) calendar months from the date of injury; provided, said salary or rate of pay shall be decreased each month by the amount of Workmen's Compensation Benefits received or to be received by such employee. (Ord. 642, § 2.)

Article 20. Employees' Suspension and Discharge Board

Sec. 1–60. Board created; membership.

There is hereby established an employees' suspension and discharge board. It shall consist of five (5) members appointed by the mayor with the approval of the city council for overlapping terms of two (2) years to serve until their respective successors have been appointed and qualified. The terms of three (3) members shall expire at 7:30 p.m. on the first Monday in May in every odd-numbered year; and, the terms of two (2) members shall expire at 7:30 p.m. on the first Monday in May in every even-numbered year. The mayor with the approval of the

council may remove a member for the good of the service and may fill vacancies for the unexpired terms. Members must be residents of the City of Anadarko, Oklahoma, and shall serve without compensation. Every year, at the time prescribed for the beginning of the terms of new members or as soon thereafter as practicable, the employees' suspension and discharge board shall elect a chairman, a vice-chairman, and a secretary; and, the secretary need not be a member of the board. The chairman of the board, city manager or any three (3) members of the board may call a meeting after giving verbal or written notice to each member, setting forth the time and place that the meeting will be held. (Ord. 724, § 1.)

Sec. 1–61. Duties of the board.

It shall be the duty of the employees' suspension and discharge board to review the facts and circumstances leading to the suspension or discharge of any city employee, and said board shall make its recommendation to the city manager as to whether or not any city employee shall be suspended or discharged or in the event said employee is already suspended or discharged, the board shall make its recommendation to the city manager as to whether or not such employee should be reinstated. The word "employee" is hereby defined to mean any employee of the City of Anadarko, Oklahoma, not appointed by the city council. (Ord. 742, § 2.)

Article 21. Policemen's Board of Review

Sec. 1–62. Board created; membership.

There is hereby created for the City of Anadarko, Oklahoma, a board of review to hear appeals concerning the discharge of policemen and police officers. The board of review shall consist of the mayor, ex-officio, who shall be a voting member; two (2) policemen, retired or active; one (1) attorney and one (1) physician who are residents of the city. Whenever persons having the qualifications above specified are unavailable, the mayor may appoint members of the city council to serve on the board.

Neither the police commissioner nor any person having direct appointive authority for police personnel shall be eligible for appointment. (Ord. 605, § 1.)

Sec. 1–63. Appointment and term of office.

The mayor, or acting mayor, as the case may be, of Anadarko, Oklahoma, shall appoint the members of the board of review with the approval of the majority of the city council. The appointive members of the board of review shall serve at the pleasure of the appointing official. (Ord. 605, § 2.)

Sec. 1–64. Discharge not to be without cause.

No policeman or police officer may be discharged without cause. (Ord. 605, § 3.)

Sec. 1–65. Appeals.

Any policeman or police officer who is discharged may appeal his case to the board of review within fifteen (15) days from the date of the discharge by filing with the board a written statement setting forth the grounds of objection to the discharge. Appeals from the decision of the board of review may be taken to the District Court of Caddo County, Oklahoma, and thereafter to the Supreme Court of Oklahoma and the decision of the Supreme Court shall be final. Said appeal shall be governed in all respects by the provisions of the statutes of the State of Oklahoma, relating to appeals from such board of review to the District Court and the Supreme Court of Oklahoma. (Ord. 605, § 4.)

Article 22, Bonds

Sec. 1–66. Certain personnel to be bonded.

(a) Before entering upon their official duties, the following personnel of the city government shall provide bonds for the faithful performance of their official duties, payable to the city, with a surety company authorized to operate within the state, in the amounts respectively indicated after their titles:

(1) city manager	$10,000.00
(2) city clerk	10,000.00
(3) city treasurer	20,000.00

(b) The council, by motion or resolution, may require other officers and employees in such positions as it may designate to be bonded.

(c) The premiums on such bonds shall be paid by the city. (Code 1956, Ch. 13, § 265.)

Sec. 1–67. Blanket bond.

The city shall provide for a blanket bond to cover any and all of its officers and employees and the city shall pay the premiums on such bond. The bond shall be in the amount of two thousand five hundred dollars ($2,500.00).

Appendix G

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D.C. 20530

NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

May 3, 1979

CERTIFIED MAIL

Mr. Bruce Dean Poolaw
c/o Grover Miskovsky, Esquire
Miskovsky, Sullivan & Miskovsky
Attorneys at Law
Suite 830 Hightower Building
Oklahoma City, Oklahoma 73102

Re: EEOC Charge Against Anadarko
City Police Department
No. 063790221

Dear Mr. Poolaw:

Because you filed the above charge with the Equal Employment Opportunity Commission, and the Commission has determined that it will not be able to investigate and conciliate that charge within 180 days of the date the Commission assumed jurisdiction over that charge, and this Department has determined that it will not file any lawsuit based upon that charge within that time, and because you through your attorney have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 200e, *et seq.*, against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate United States District Court within 90 days of your receipt of this Notice.

Your attorney may inspect the investigative file pertaining to your case at a time and place convenient to the parties. That file is located in the EEOC District Office, 212 N. St. Paul Street - Sixth Floor, Dallas, Texas 75201.

We request that you send this Department a copy of any complaint initiating suit.

This Notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your charge is meritorious.

Sincerely,

Drew S. Days III
Assistant Attorney General
Civil Rights Division

By:
Herbert A. Goldsmith, Jr.
Attorney
Federal Enforcement Section

cc: Lorenzo Ramirez
District Director
Dallas District Office
Equal Employment Opportunity
Commission
212 N. St. Paul Street
Sixth Floor
Dallas, Texas 75201

Appendix H

To: Bruce Poolow, Patrolman
From: R. Madison, City Mgr.

Effective 1/4//78 you are terminated for the following reasons.

Your application had false statements. Debtors are constantly calling me ie: past due bills, false and bogus checks.

The citizens of Anadarko should not have to pay anyone with this type personal status.

R. Madison
City Manager

Appendix I-1

Law Offices
PAIN AND GARLAND
111 S.W. Second
Anadarko, Oklahoma
73005

LESLIE PAIN
JOHN W. GARLAND

Telephones 247–3365
247–3366

February 6, 1979

Mr. Bruce Poolaw
P.O. Box 982
Anadarko, Oklahoma 73005

Dear Mr. Poolaw:

In answer to your inquiry as to proceedings of the Policy Review Board concerning your appeal from termination of your employment by the City Manager of the City of Anadarko, this will advise that I was present and participated in the hearing held in the Anadarko Municipal Complex, in the City of Anadarko, Oklahoma, held at 5:30 P.M. on August 8, 1978, at which all five members of the Police Review Board were present, that testimony and written evidence was presented and arguments made to the Board, after which the Board, in closed session, by a vote of 3 for and 2 against the decision, found that there was insufficient evidence to sustain the action of the City Manager in terminating your employment and that the termination was without sufficient legal cause.

Yours very truly,

of
PAIN AND GARLAND

LP:kc

This is to certify that I have read the above and foregoing letter and that the statements therein set forth are true and correct.

_____

Leslie Pain

Subscribed and sworn to before me this 6th day of February, 1979.

_____

Notary Public

My commission expires:
April 10, 1981

Appendix I-2

February 16, 1979

Mr. Bruce Poolaw
P. O. Box 982
Anadarko, Oklahoma 73005

Dear Mr. Poolaw:

In answer to your inquiry as to proceedings of the Policy Review Board concerning your appeal from termination of your employment by the City Manager of the City of Anadarko, this will advise that I was present and participated in the hearing held in the Anadarko Municipal Complex, in the City of Anadarko, Oklahoma, held at 5:30 P.M. on August 8, 1978, at which all five members of the Police Review Board were present, that testimony amd written evidence was presented and arguments made to the Board, after which the Board, in closed session, by a vote of 3 for and 2 against the decision, found that there was insufficient evidence to sustain the action of the City Manager in terminating your employment and that the termination was without sufficient legal cause.

Yours very truly,

Paul Paige

This is to certify that I have read the above and foregoing letter and that the statements therein set forth are true and correct.

_____

Paul Paige

Subscribed and sworn to before me this 16th day of February, 1979.

_____

Notary Public

My commission expires:

Appendix I-3

February 16, 1979

To Whom it May Concern:

This is to certify that I was present before the Police Review Board, City of Anadarko, Anadarko, Oklahoma, at 5:30 pm on August 8, 1978 in the Anadarko Municipal Complex, Anadarko, Oklahoma and argued against the termination of Mr. Bruce Poolaw's employment from the Anadarko Police Department.

After the Board sit in closed session Mr. Poolaw and I were called before the Board and advised by the Mayor, City of Anadarko, that the Board by a vote of 3 for and 2 against the decision, found that there was insufficient evidence to sustain the action of the City Manager in terminating Mr. Poolaw's employment and that the termination was without sufficient legal cause.

Furthermore, I recall discussing this case prior to the Board meeting with the City Manager who advised me that he knew Mr. Poolaw personally and regardless of the Board's decision he would not re-employ Mr. Poolaw.

_____

OLIVER E. DAVIS

_____

Notary Public

My Commission Expires:

_____

Supreme Court of the United States

No. A–213

BRUCE POOLAW,

Petitioner,

v.

CITY OF ANADARKO, OKLAHOMA,

et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above entitled cause be, and the same is hereby, extended to and including October 25, 1984

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 22nd
day of September, 1984

Office-Supreme Court, U.S.
FILED
NOV 21 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-689

In the Supreme Court of the United States

OCTOBER TERM, 1984

BRUCE POOLAW,
Petitioner,

v.

CITY OF ANADARKO, OKLAHOMA; MAYOR OF ANADARKO, CLARK McCASKILL; CITY MANAGER, ROYCE HUNTER; FORMER ACTING CHIEF OF POLICE, J. C. GIVENS; and FORMER ACTING CITY MANAGERS, BOB WILKERSON and RON MADISON,
Respondents.

RESPONSE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

John Joseph Snider
Counsel of Record

Margaret McMorrow-Love

FELLERS, SNIDER, BLANKENSHIP
BAILEY & TIPPENS
24th Floor, First National Center
Oklahoma City, Oklahoma 73102
(405) 232-0621

Attorneys for Respondents

November, 1984

QUESTIONS PRESENTED

Whether the Court of Appeals applied the proper test in affirming the District Court's finding that plaintiff had failed to satisfy the burden of proof under 42 U.S.C. §2000(e), the Civil Rights Act of 1964.

Whether punitive damages may be assessed against a municipality pursuant to 42 U.S.C. §1981 of the Civil Rights Act of 1866.

Whether the Court of Appeals applied the proper test in determining the assessment of attorney fees to a partially prevailing plaintiff.

PARTIES TO THE PROCEEDINGS

The respondents are the City of Anadarko, the former City Manager, Royce Hunter, the former acting Chief of Police, J. C. Givens and former acting City Managers, Bob Wilkerson and Ron Madison. Clark McCaskill, a named defendant in the court below, was dismissed as a party defendant by plaintiff before the start of trial in the United States District Court for the Western District of Oklahoma.

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No. 84-689

In the
Supreme Court of the United States
OCTOBER TERM, 1984

BRUCE POOLAW,
Petitioner,

v.

CITY OF ANADARKO, OKLAHOMA; MAYOR OF ANADARKO, CLARK McCASKILL; CITY MANAGER, ROYCE HUNTER; FORMER ACTING CHIEF OF POLICE, J. C. GIVENS; and FORMER ACTING CITY MANAGERS, BOB WILKERSON and RON MADISON,
Respondents.

RESPONSE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 738 F.2d 364 and is reprinted as Appendix "A" to the Petition for Writ of Certiorari filed by petitioner herein. A prior opinion of the United States Court of Appeals for the Tenth Circuit in this matter is reported at 660 F.2d 549 and is reprinted as Appendix "B" to petitioner's brief.

There is no formal opinion of the United States District Court for the Western District of Oklahoma. The Journal Entry of Judgment rendered by the United States

District Court for the Western District of Oklahoma incorporating the jury verdict, the court's Order on the respondents' Motion for Judgment Notwithstanding the Verdict and the petitioner's request for attorney fees dated May 27, 1982, is reprinted as Appendix "D" to petitioner's brief.

JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 27, 1984. The time within which to file a Petition for Writ of Certiorari was extended by Justice Byron White by Order dated September 22, 1984. Petitioner has not stated the statutory provision pursuant to which the jurisdiction of this Court is invoked. Respondents assume petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Respondents assert that the pertinent statutes involved in this matter are 42 U.S.C. § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1983 of the Civil Rights Act of 1871; 42 U.S.C. § 2000(e) of the Civil Rights Act of 1964 and 42 U.S.C. § 1988. The pertinent portions of these statutes are set forth in Appendices "A" through "D" hereof.

STATEMENT OF THE CASE

Petitioner, Bruce Poolaw, is a former police officer with the City of Anadarko Police Department. He filed his complaint in the United States District Court for the Western District of Oklahoma alleging discrimination based upon

his race, American Indian. The action was brought pursuant to 42 U.S.C. §§ 1981, 1983, and 2000(e) of the Civil Rights Acts. The Complaint sought damages in the amount of $600,000 compensatory damages, $400,000 punitive damages, back pay, reinstatement and attorney fees. Poolaw alleged that he was discriminated against on the basis of his race in the terms and condition of his employment as a police officer and that he was unjustifiably terminated and refused reemployment based upon his race.

Poolaw was employed as a police officer in February of 1977 and terminated on January 4, 1978. Mr. Poolaw had had prior law enforcement experience before joining the police force of the City of Anadarko. That experience included a term as a patrolman with the City of Altus police force. He left that position under a cloud, having been suspended from active duty after complaints were filed by citizens of Altus alleging that he was soliciting money from illegal Mexican aliens. (TR 440, 416). During the pendency of the investigation and before the fact finding was complete, Poolaw resigned his position.

During his service with the City of Anadarko police force, Poolaw received a thirty (30) day suspension from duty in November of 1977 when a citizen filed an information with the District Attorney of Caddo County and a warrant was issued for Mr. Poolaw's arrest on a bogus check charge. (TR 169-170). During this same time period, the City Manager and Chief of Police received numerous complaints from citizens with reference to Mr. Poolaw's failure to honor his debts and obligations as they were incurred. (TR 165-168, 356-359).

The City subsequently received information that an additional bogus check incident had occurred and that a warrant for Mr. Poolaw's arrest had been issued in an adjoining county. (TR 434-435). The former Chief of Police testified that he would not have hired Poolaw if he had known of the arrest record. (Tr. 162).

Poolaw was counselled about his financial problems and his actions in driving an unregistered vehicle to and from the police station by the City Manager, Ron Madison. (TR 356-360). His fellow police officers complained to the Chief of Police about Mr. Poolaw taking money from them to purchase jackets which had not been delivered promptly. (TR 360). Considering all factors, it was determined that Mr. Poolaw did not have the requisite character to be a police officer.

Poolaw was informed of his termination from the police force by the then Chief of Police, J. C. Givens, and Assistant Chief, E. M. "Bunk" Salmon. The reasons articulated for his termination were falsification of his employment application regarding his arrest record, past due bills, bogus check complaints and complaints for failure to promptly pay his bills as they were incurred. Pursuant to the Ordinance of the City of Anadarko, Poolaw filed an appeal to the City of Anadarko Policeman Board of Review. (TR 461-462).

After unavoidable delays, two hearings were held on the appeal. At the close of the second hearing, the Board determined that there was insufficient evidence to sustain the decision to terminate the plaintiff. However, the Board neither mandated that Mr. Poolaw be reinstated nor determined what remedy, if any, was appropriate. (TR 122).

Subsequent to Mr. Poolaw's termination, the City of Anadarko employed a new City Manager, Royce Hunter. Mr. Hunter had been the City Manager at the City of Altus during the time that Bruce Poolaw was on the Altus police force. He was fully familiar with the trouble that the City of Altus had encountered with reference to Poolaw's employment as a police officer, including the citizen's complaint. (TR 386).

Based upon the information concerning Poolaw's character and fitness for performance of the duties of a police officer, the decision was made that he failed to meet the minimum requisites necessary for a patrol officer. The decision was based upon his falsification of his employment application, the warrants for his arrest issued in two and possibly three counties, numerous complaints by citizens, his poor driving record, his record as a police officer with the City of Altus, and the complaints by his fellow officers. The decision not to reinstate Poolaw was not based upon any allegation of intoxication.

At approximately the same time, the City of Anadarko also terminated a Caucasian police officer, Bill Weeks. Mr. Weeks' termination was due to one garnishment of his wages. Ron Madison testified that he had made the decision to terminate Mr. Weeks while the City Attorney was unavailable. After being informed that Oklahoma law prohibited termination on the grounds of one garnishment, Mr. Weeks was reinstated under state law, 14A O.S. § 5-106. (TR 335-337). His termination and reinstatement were not based upon his race.

Following his termination, Mr. Poolaw filed a charge of discrimination with the Equal Employment Opportunity Commission and subsequently initiated an action in the United States District Court for the Western District of Oklahoma on July 19, 1979, which complaint was amended on October 1, 1979.

In the original complaint, Poolaw sought punitive damages against all defendants. The City of Anadarko filed a Motion to Strike the request for punitive damages under 42 U.S.C. §§ 1981 and 1983 pursuant to the decision of this Court in the *City of Newport* v. *Facts Concerts, Inc.*, 453 U.S. 247 (1981). On February 1, 1982, the court entered an order granting the City's Motion pursuant to 42 U.S.C. § 1983 but denied the request as to the claims asserted under 42 U.S.C. § 1981. The court noted that the City's Motion to Strike punitive damages under 42 U.S.C. § 1981 would be held in abeyance through the time of trial. The court stated that if punitive damages were awarded by the jury, the court would consider the City's motion as a Motion for Judgment Notwithstanding the Verdict.

The jury returned a verdict findng in favor of the plaintiff, Bruce Poolaw, and against the respondents as set forth in Appendix "C" (p. 27a) of Petitioner's Brief. On April 26, 1982, the City of Anadarko, and defendants, Royce Hunter and Ron Madison, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, moved the court for an Order setting aside the verdict on a variety of grounds. The City of Anadarko also alleged that the award of punitive damages was not authorized against a municipality in an action brought under 42 U.S.C. § 1981. Mr. Hunter asserted that the award of punitive damages against him was

not supported by any evidence of malice, ill will or intent to deprive plaintiff of Constitutional rights. In the alternative, respondents moved for a new trial or a remittitur. Respondents also requested that the court deny the Title VII claim.

The court heard arguments on the Motion for Judgment Notwithstanding the Verdict on May 27, 1982. The court sustained the Motion as a matter of law with reference to the punitive damage award against the City of Anadarko under 42 U.S.C. § 1981 and ordered that the $40,000 punitive damage award be stricken from the verdict. The court overruled the Motion in all other respects. The court also heard the Motion to Deny the Title VII claim under 42 U.S.C. § 2000(e) and found in favor of all of the respondents and against petitioner.

On May 28, 1982, counsel for petitioner put on evidence as to attorney fees and the court found a reasonable attorney fee to be in the amount of $20,000.

ARGUMENTS

I. THE DISTRICT COURT'S FINDINGS UNDER 42 U.S.C. §2000(e) WERE PROPER BASED UPON THE EVIDENCE PRESENTED.

Petitioner pursued his action against the respondents under a variety of statutes. Pursuant to applicable authorities, the case was tried to the jury under 42 U.S.C. §§ 1981 and 1983 and to the trial court as the trier of fact under 42 U.S.C. § 2000(e). *Great American S. & L. Assn.* v. *Novotny,* 442 U.S. 366 (1979). In that capacity, the court found in favor of respondents.

Petitioner asserts that the court erred in its decision that the evidence did not support an award under the Civil Rights Act of 1964. Respondents suggest that the Petitioner's argument evidences a misunderstanding of the District Court's task as well as the task of the Court of Appeals in reviewing the decision of the District Court. On appeal, the scope of review is narrow at best:

> "It is obviously not the function of the appellate court to try the facts or substitute for the trial court in the determination of factual issues. The appellate court does not weigh the evidence presented at trial, but instead only determines its sufficiency to support the findings." *Sabol* v. *Snyder,* 524 F.2d 1009, 1011 (10 Cir. 1975), citing *Southwestern Investment Co.* v. *Cactus Motor Co.,* 355 F.2d 674 (10 Cir. 1966).

The Court of Appeals applied the proper test for a prima facie case articulated by this Court in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). Respondents presented evidence of a legitimate non-discriminatory reason for the actions taken, *Texas Dept. of Community Affairs*

v. *Burdine*, 450 U.S. 248, 254 (1981). Thus, the presumption dropped from the case and the trial court, as the trier of fact, was in the position to decide the ultimate issue of the case. *Postal Service Board of Governors* v. *Aikens*, ... U.S. ....., 103 S.Ct. 1478 (1983). The District Court determined that Poolaw had failed to establish that the City of Anadarko or the individual respondents were liable under Title VII.

Petitioner presents numerous "facts" to this Court in an apparent attempt to relitigate the facts in issue. Such "facts" are not dispositive. Even where the testimony and the inferences therefrom are conflicting, as is true in almost all litigation, the issue on appeal is whether the trial court's resolution of the facts was clearly erroneous. Absent such a showing, the ultimate findings of facts in Title VII actions should stand. See *Curry* v. *Oklahoma Gas & Elec. Co.*, 730 F.2d 598, 602 (10 Cir. 1984). No showing has been made.

Petitioner also attempts to argue that a random comment by the court with reference to a statement allegedly made by a juror formed the basis of the court's decision as opposed to the court reaching an independent determination. The Court of Appeals specifically found at footnote 3 (Appendix "A", p. 6a) that the District Court had not improperly based his ruling upon a remark made outside the record. The court held:

> "We find it untenable to suppose that the trial judge would disregard four days of testimony and other evidence, admitted through proper channels at trial, in order to be swayed by a juror's extraneous comments."

Petitioner may indeed find it hard to believe that two differing judgments could be rendered upon the same facts.

However, there were two triers of facts and reasonable men may differ. Absence a showing that the trial judge was clearly erroneous in the conclusion he reached upon the evidence, the verdict under 42 U.S.C. § 2000(e) must be sustained.

II. PUNITIVE DAMAGES MAY NOT BE ASSESSED AGAINST A MUNICIPALITY PURSUANT TO 42 U.S.C. §1981.

The principal issue in this case was whether, as a matter of law, punitive damages may be assessed against a municipality pursuant to the provisions of 42 U.S.C. § 1981. The City of Anadarko first raised the issue in its Motion to Strike plaintiff's request for punitive damages. The City asserted that this Court's opinion in *City of Newport* v. *Facts Concerts, Inc., supra,* necessitated a finding that punitive damages may not be assessed against a municipality. The District Court subsequently adopted that position in its order on the defendant's Motion for Judgment Notwithstanding the Verdict. That decision was affirmed by the United States Court of Appeals for the Tenth Circuit.

Respondents have been unable to find any decision by this Court specifically holding that punitive damages may not be awarded under 42 U.S.C. § 1981. However, the majority of lower courts which have addressed the issue subsequent to the Court's opinion in *City of Newport* v. *Facts Concerts, Inc., supra,* have adopted the rationale of that opinion and have expanded it to the provisions of 42 U.S.C. § 1981.

In *City of Newport* v. *Facts Concerts, Inc., supra,* this Court examined the immunity of a municipality from puni-

tive damage awards in accordance with common law, the public policy and purposes served by punitive damages and the legislative intent of Congress. The opinion holds:

> "A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for punitive purposes, therefore, are not sensibly assessed against the governmental entity itself." *City of Newport* v. *Facts Concerts, Inc.*, 453 U.S. at 267.

This Court concluded that there was no evidence that Congress intended to disturb the settled common law immunity and that no public purpose would be served by allowing an award of punitive damages against a governmental entity under 42 U.S.C. § 1983.

The analysis presented by this Court in the *City of Newport* v. *Facts Concerts, Inc., supra,* decision has been expanded to actions under 42 U.S.C. § 1981. Such an expanded interpretation of this Court's decision does not offend public policy and does not interfere with the advancement of the objectives for which this statute was enacted.

At common law, the liability of a municipality did not extend to an award of punitive damages. This common law immunity continues unless specific statutory intent to abolish the immunity is found within the legislative history of the Act. Petitioner has been unable to direct the Court's attention to any such legislative history of 42 U.S.C. § 1981 which would indicate the intent of Congress to abolish the specific statutory immunity.

It is also useful to bear in mind the purpose for which punitive damages are assessed. A plaintiff is allowed punitive damages as a windfall because society is deemed to benefit from detering malicious or intentional conduct. Such

an award does not compensate for a specific injury but is designed to punish. There is no rationale justifying an award of punitive damages against a municipality since no social benefit is derived therefrom. Petitioner has ignored wholly the statements of this Court concerning whether the public policy to be advanced in awarding punitive damages is served in awarding punitive damages against a municipality. As the Court in *City of Newport* v. *Facts Concerts, Inc., supra* noted:

> "Regarding retribution, it remains true that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party. Thus, there is no question here of equitably distributing the losses resulting from official misconduct. (Citation omitted). Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *City of Newport* v. *Facts Concerts, Inc.*, 453 U.S. at 267.

The majority of courts which have addressed the issue under 42 U.S.C. § 1981 have held that the rationale expressed above is equally applicable under 42 U.S.C. § 1981. Both the First Circuit and the Tenth Circuit have ruled that punitive damages may not be recovered against a municipality in an action brought under 42 U.S.C. § 1981. In *Heritage Homes, Etc.* v. *Seekonk Water Dist.*, 670 F.2d 1 (1 Cir. 1982), the Court directly faced the question of whether punitive damages should be awarded against a

municipality under 42 U.S.C. § 1981. In rejecting the argument that the immunity under 42 U.S.C. § 1983 does not apply to 42 U.S.C. § 1981, the Court held:

> "In light of *Fact Concerts* we conclude that 'both history and policy' support municipal immunity from punitive damages under § 1981." *Heritage Homes, Etc.* v. *Seekonk Water Dist.*, 670 F.2d at 3.

The First Circuit noted that the plaintiff had been unable to point to any legislative history which would indicate that Congress intended to overturn the common law immunity from punitive damages in enacting 42 U.S.C. § 1981. Petitioner in this action has likewise been unable to make such a demonstration.

In *Poolaw* v. *City of Anadarko, Okla.*, 738 F.2d 364 (10 Cir. 1984), the Court ruled that it was in accord with the result reached by the First Circuit in *Heritage Homes, Etc.* v. *Seekonk Water Dist., supra.* The Court held that the petitioner had failed to persuade the Court by reference to any legislative history or otherwise that Congress intended to override the immunity for punitive damages traditionally enjoyed by a municipality. In addition, the Court found that the policy arguments in favor of municipal immunity are valid as applied to either § 1983 or § 1981 of Title 42. *See also Ferguson* v. *Joliet Mass Transit Dist.*, 526 F.Supp. 222 (N.D. Ill. 1981); *Bell* v. *City of Milwaukee*, 536 F.Supp. 462 (E.D. Wis. 1982); and *Holly* v. *City of Naperville*, 571 F.Supp. 668 (N.D. Ill. 1983).

Respondents suggest that the decision of the District Court and of the Court of Appeals was correct and that a municipality is immune from an award of punitive damages under 42 U.S.C. § 1981.

III. THE ATTORNEY FEE AWARDED WAS APPROPRIATE UNDER THE CIRCUMSTANCES.

Petitioner requests this Court to reverse the lower court's award apparently asserting that the award which petitioner characterizes as unrealistic, unfair and dismally low results in a denial of his equal protection rights. Respondents assert that the fee was more than adequate in view of the fact that the plaintiff was, at best, only partially prevailing and in view of the applicaton of the appropriate tests for determining the reasonableness of fee awards.

The District Court for the Western District of Oklahoma held an evidentiary hearing and allowed counsel for plaintiff to present evidence and expert testimony concerning the appropriate fee to be awarded in view of the work performed and the results obtained. The Court, upon careful consideration of the evidence as applied to the elements to be considered, found that an attorney fee in the amount of $20,000 was appropriate.

Subsequent to the District Court's findings, this Court provided additional guidance on the question of the appropriate factors to be considered in an award of attorney fees under 42 U.S.C. § 1988. In *Hensley* v. *Eckerhart,* ..... U.S. ....., 76 L.Ed.2d 40 (1983), this Court addressed the extent to which the plaintiff's success is a factor in determining the proper amount of attorney fees to be awarded.

In reaching its decision, this Court traced the legislative history of the Act and concluded that it did not provide a definitive answer as to the proper standards for setting fee awards where plaintiff had achieved only limited success. The Court held:

> "If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. . . . Again, the most critical factor is the degree of success obtained." 76 L.Ed.2d at 52.

The decision in *Hensley* v. *Eckerhart, supra* noted that the fee applicant bears the burden of establishing entitlement to an award by documenting the appropriate hours expended and the hourly rate. This Court specifically concluded that counsel should maintain billing time records in a manner which will enable a reviewing Court to identify distinct claims. In addition, this Court reemphasized its position that the District Court has discretion in determining the appropriateness of an award since the District Court has superior understanding of the litigation.

The United States Court of Appeals for the Tenth Circuit had the benefit of this Court's ruling in *Hensley* v. *Eckerhart, supra,* when it examined and affirmed the lower court's award of a $20,000 attorney fee. In applying that decision to the facts of this case, it is clear that the plaintiff was, at best, only partially prevailing. He was wholly unsuccessful as to any respondent on his claims under 42 U.S.C. § 2000(e). Similarly, he was unsuccessful in his claims under 42 U.S.C. § 1981, as to the individual respondents. In addition, his claims under 42 U.S.C. § 1983 were only partially successful with only a $1.00 nominal damage award under the equal protection claim and $3.00 actual damages under the due process claims.

In addition, the Court of Appeals had the benefit of its own opinion, *Ramos* v. *Lamm*, 713 F.2d 546 (10 Cir. 1983) issued subsequent to this Court's opinion in *Hensley* v. *Eckerhart, supra.* In *Ramos* v. *Lamm, supra*, the Court noted that the first step in calculating fees is to determine the number of hours reasonably spent by counsel. The Court held that in the future, all lawyers would be required to keep "meticulous, contemporaneous time records" if they intend to seek fees under 42 U.S.C. § 1988. In this case, it is beyond dispute that counsel for plaintiff failed to keep such time records. In addition, the necessity for contemporaneous time records had long been a requirement of attorneys practicing in the State of Oklahoma. The Oklahoma Supreme Court had mandated that attorneys who seek fee awards were required to present detailed time records to the Court. *State ex rel. Burk* v. *City of Oklahoma City*, 598 P.2d 659 (Okl. 1979).

The evidence presented by counsel for petitioner indicated that the documentary evidence was neither meticulous nor contemporaneous. Mr. Miskovsky testified that his hours were a summation prepared the night before the hearing by referring to pleadings in the file and a review of docket sheets. (Motion Transcript, p. 6). Clearly, such records are inaccurate and cannot provide the necessary basis for determining the reasonableness of the time spent. The District Court carefully scrutinized the records as was its duty and found that the hours represented by counsel in the summation were greatly exaggerated. The trial court properly exercised its vigilance in reducing needlessly high and unsupported claims for hours expended.

The Court of Appeals in *Ramos* v. *Lamm, supra* also indicated that a District Court should examine how the hours claimed were allotted to specific tasks. The District Court in this case did perform such an analysis.

In addition, co-counsel for the petitioner in the case claimed approximately 386 hours. Again, these records were, in part, incomplete and showed an approximation as opposed to contemporaneous time records. In addition, the record summaries showed a duplication of effort. The trial court is entitled to discount attorney fees where it is evident that a duplication of services has occurred. *Taylor* v. *Sterrett,* 640 F.2d 663 (5 Cir. 1981); *Ramos* v. *Lamm,* 713 F.2d at 554.

At the evidentiary hearing, petitioner also presented testimony of two practicing attorneys in an attempt to substantiate the fee request. Neither attorney was familiar with the issues in the case. The trial court on the other hand, was very familiar with the issues presented in the case and properly considered the same in the award rendered.

Petitioner outlines twelve elements which he contends are the ultimate guidelines in determining a reasonable fee. The Court of Appeals was fully conversant with those elements when it rendered its opinion in *Ramos* v. *Lamm, supra.* The District Court considered the elements as appropriate. The time and labor required was determined by the Court with a specific holding that the time claimed on the reconstructed time records was grossly exaggerated. The expert witnesses were unable to testify as to the novelty or difficulty of the issues since they were wholly unfamiliar with the same. The trial court was also acquainted

with the customary fees awarded in that district. As this Court has held, the reasonableness of a fee is to be calculated according to the prevailing market rate in the relevant community and not according to the cost of providing the specific legal services involved. *Blum* v. *Stenson*, 52 Law Week 4377 (Mar. 21, 1984).

The petitioner also argues that the Court should consider the amount and results obtained, the experience and competency of counsel and the desirability of the case in determining the appropriateness of an award. The Court of Appeals in *Ramos* v. *Lamm, supra*, noted that Civil Rights cases now comprise a large part of all federal litigation and that no stigma remains associated with the defense of these cases. Counsel representing a client in a Civil Rights case is no longer a lone voice crying in the wilderness.

As to the results obtained and the skill involved in reaching those results, the District Court, which was in the best position to evaluate counsel, concluded that counsel had failed to comply with numerous orders of the Court, had engaged in objections to evidence favorable to his own client, and had exercised improper courtroom decorum in violation of the local rules of practice. In addition, the Court noted the disproportionate ratio between the requested fee of $121,000 and the actual results obtained of a verdict of $11,004.

Based upon these findings, the trial court properly determined that the requested award was unreasonable. It is the responsibility of the trial court, which has seen the attorney's work at first hand and is familiar with the case and prevailing rates in the area to determine the fee. The

exercise of that discretion should not be upset, absent of finding of clear abuse. *Gurule* v. *Wilson*, 635 F.2d 782 (10 Cir. 1980); *Higgins* v. *State of Okl. ex rel. Okl. Emp. Sec.*, 642 F.2d 1199 (10 Cir. 1981). There is no evidence of abuse of that discretion in this case.

CONCLUSION

The respondents herein respectfully assert that the decision of the United States Court of Appeals for the Tenth Circuit is proper in all respects, and request that the Court decline to issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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November, 1984

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this ..... day of November, 1984, three copies of the foregoing Response Brief in Opposition to the Petition for Writ of Certiorari were deposited in the United States Post Office with first-class postage prepaid thereon, addressed to counsel of record, Grover Miskovsky, 5801 N. Broadway Extension, Suite 101, Oklahoma City, Oklahoma 73118.

Counsel further certifies that all parties required to be served have been served.

John Joseph Snider

APPENDIX "A"

The provisions of 42 U.S.C. § 1981 are as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

APPENDIX "B"

The pertinent provisions of 42 U.S.C. § 1983 are as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

APPENDIX "C"

The pertinent provision of 42 U.S.C. § 1988 is as follows:

> "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the revised statutes [42 U.S.C. §§ 1981-1983, 1985, 1986] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

APPENDIX "D"

The pertinent provisions of 42 U.S.C. § 2000e-2(a) are as follows:

"a. *EMPLOYERS*. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; . . ."

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DEC 18 1984

No. 84-689

Supreme Court, U.S.
FILED
DEC 18 1984
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

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Petitioner,

v.

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Respondents.

REPLY TO RESPONSE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December, 1984

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of The United States:

BRUCE POOLAW, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States District Court of Appeals for the Tenth Circuit entered in the above entitled case on June 27, 1984.

Petitioner herein filed his Petition for Writ of Certiorari to the United States District Court of Appeals for the Tenth Circuit on October 25, 1984. Respondents thereafter filed their Response Brief in Opposition to Petition for Writ of Certiorari in November, 1984. Petitioner herewith files his Reply.

Respondents, in their Statement of the Case, attempt to show, as they did at trial, that they had cause to terminate Poolaw for reasons other than race. In this attempt to further mislead the Court, the Respondents have failed to mention that the alleged reasons which they give for having terminated Poolaw's employment were determined, on two different occasions by two different fact-finding bodies, and that both found in favor of Poolaw and against the accusers.

The point Respondents ignore and the trial court and lower appellate Court erred in their decision regarding, was that:

1. Poolaw was fired;

2. Poolaw pursuant to law was given a hearing;

3. The Policeman's Board of Review (set up by the City of Anadarko, itself) found in favor of Poolaw;

4. That the City of Anadarko failed to appeal the decision of the Board to the District Court and Supreme Court of the State of Oklahoma as specifically provided by Ordinances, Charter Provisions and State Statute; and

5. Yet Poolaw was never reinstated, when caucasions under the same procedural processes were reinstated.

The City of Anadarko had a duty, under the law, when insufficient evidence existed to support their termination of Poolaw, to reinstate him with back pay. Then, if later, the City discovered additional information to support termination proceedings, they were under an obligation to give Poolaw notice; afford him a new hearing; and pursuant to the outcome of that hearing; either reinstate Poolaw, or terminate him. They did neither, and to date Poolaw has not been reinstated.

However, Petitioner was never reinstated after the first hearing, and no new evidence, firing, notice or other proceeding established by ordinance was had by the City, and the only reasoning for this type of action by the City is discrimination.

Furthermore, Respondents flatly ignore the fact, that upon the trial of this cause, and after all evidence was submitted to a six member jury, the jury returned a verdict in favor of Poolaw in the amount of $51,004.00.

Two different hearings, held six years apart, and both found in Poolaw's favor. The Policeman's Board of Review found there was insufficient evidence to support Poolaw's termination and the jury found in favor of Poolaw under 42 U.S.C. § 1981 and § 1983 a total judgment of $51,004.00.

It is respectfully submitted, that no other conclusion can be reached, to substantiate the City's actions against Poolaw than they intentionally and without cause denied Poolaw his Civil rights, equal protection under the law and denied him due process of law, and that discrimination was the motivating factor behind these acts. Furthermore, the City continues to operate to prevent him either reinstatement or employment.

REASONS FOR GRANTING WRIT

I

CERTIORARI SHOULD BE GRANTED TO REVERSE APPELLATE COURT'S DENIAL OF TITLE VII CLAIM.

Petitioner believes that he established, without question, a prima facia case of discrimination against the Respondents herein, under Title VII, as exemplified by the jury verdict of $50,000.00 Furthermore, Petitioner believes that when the burden shifted to the Respondents to show a legitimate, non-discriminatory reason for his firing, that Respondents failed to produce such proof, and that the Trial Court and Appellate Courts erred in their decisions.

Petitioner bases his statement on the following issues:

1. Respondents submitted to the Policeman's Board of Review, before their determination on August 8, 1978, all evidence which they had to support Poolaw's firing. Based upon the evidence presented, the Policeman's Board of Review found there was insufficient evidence to support Poolaw's termination.

2. Respondents submitted to a jury, on Petitioner's 42 U.S.C. § 1981 claim, all evidence which they had to support Poolaw's firing. Based upon the evidence presented, the jury found in favor of Poolaw and awarded him $50,000.00 in actual and punitive damages against the City of Anadarko. On Cross-Appeal, the Tenth Circuit upheld the $10,000.00 actual damage award, and agreed with the Trial Court's remittitur of $40,000.00 punitive damages (which is discussed in detail later).

While Respondents attempt to brush off the conflicting decisions of the two fact finding bodies above mentioned

and the decision of the Trial Court, stating that reasonable men may differ, Poolaw believes that the trial Judge was prejudiced in his decision and committed error on the following grounds:

1. The Trial Court's conversation, reference to and his admitted agreement with a woman juror which had set on the Poolaw jury, during a voire dire examination in another case, prior to the Court's entering his final judgment in this case;

2. The Trial Court's reference to Petitioner's attorney not making a pendent jurisdiction claim, when such claim would have been improper and what the Court would have done in that event; and

3. Trial Court's outward and obvious dislike and constant castigation of Petitioner's attorney.

The Appellate Court erred in upholding the Trial Court's decision dismissing Petitioner's Title VII claim, in its review of the Trial Court's error. Petitioner submits that a close scrutiny of the entire transcript of the hearing on Petitioner's Title VII claim, by the Appellate Court, would have, without question, shown reversible error on the part of the Trial Judge, in his extraneous conversation with a juror prior to the time he had reached a final decision in this matter, as well as his prejudicial treatment of Petitioner's counsel.

Respondents had a duty and responsibility to follow the laws of the State of Oklahoma as well as the City Charter and Ordinances of the City of Anadarko. Just as they have a duty to follow State and Federal Law discouraging unfair labor and employment practices. Respondents failed to

follow City and State laws, just as they have failed to follow State and Federal Laws, prohibiting discrimination. Therefore they had no alternative but to abandon all procedural guidelines in order to achieve their ultimate goal—to get rid of the Indian.

Unless the decision of the Appellate Court and Trial Court is overturned, then the very intent of Title VII, to eliminate those practices and devices that discriminate on basis of race, color, religion, sex, or national origin, will continue to exist and all the evils that Title VII was intended to eradicate will continue.

II

CERTIORARI SHOULD BE GRANTED REINSTATING JURY AWARD OF PUNITIVE DAMAGES IN THE AMOUNT OF $40,000.00.

Poolaw reasserts his contention that the Appellate Court erred in upholding Trial Court's decision striking $40,000.00 in punitive damages which the jury awarded against the City of Anadarko, under 42 U.S.C. § 1981, concluding that punitive damages are not recoverable against a Municipality.

It is well settled that actual and compensatory or punitive damages may properly be awarded private Plaintiffs when suing under 42 U.S.C. § 1981, even when coupled with a Title VII claim. However, the law is still unsettled and at the best unclear, as to whether or not punitive damages should be awarded against a Municipality.

There is nothing inherent in Civil Rights cases, which *specifically precludes* an award of substantial punitive dam-

ages in appropriate instances under 42 U.S.C. § 1981. In determining the appropriate amount of punitive damages in such actions, the Court may look to punitive damage awards in other *intentional tort* cases.

The argument that because Congress was *silent* with reference to punitive damages against municipalities, that it therefor *meant* that punitive damages should be disallowed, is both presumptive and faulty. There are no notes which indicate that this was the intention of Congress, and that Courts are prohibited from allowing punitive damages in even the most heinous cases.

Judge O'Conner's opinion in the case from the District of Kansas, *Boyd* v. *Shawnee Mission Public Schools*, 522 F.Supp. 1115 (1981), was that:

> "The historical analysis and consideration of competing social policies relied on by the Court in its § 1983 cases are not found in the § 1981 area. The same preservation of traditional municipal immunity found by the *City of Newport* Court in the deliberations of the 42nd Congress with regard to § 1983 cannot be imputed to the legislators enacting § 1981."

Respondent's rely heavily on the case of *City of Newport* v. *Facts Concerts, Inc.*, to support their position. However, Petitioner believes that Judge O'Conner's opinion is thorough, incisive and well thought-out, and in complete agreement that that same governmental immunity established under § 1983, should not be imputed or construed to include § 1981.

Petitioner respectfully submits, to disallow punitive damages, based upon the faulty and presumptive reasoning of Respondents, *without guidelines or exceptions*, will serve

only to provide a vehicle for government officials, acting under the guise of municipal immunity, to commit wrongs against individual members of the community, in denial of their civil rights, without any fear of retribution whatsoever.

The Appellate Court states that punitive damages are intended to punish wrongdoers; unless the wrongdoer is a municipality, then punitive damages should not lie; but must focus on the Municipal Officials who have engaged in the prohibited discrimination. Petitioner states that *the City is its duly elected and appointed officials*, because without such officials the City could not function. There are no set guidelines as to what constitutes the acts of the City, as opposed to what constitutes acts of its servants, agent and employee. Petitioner contends, that when City Officials, acting in the scope of their employment, as the servants, agents and employees of the City, that *they are the City*. Especially when two or more officials enter into a conspiracy to commit wrongs against an individual, as in the case at bar.

Further, there is no question, and it is well settled that punitive damages can and should be assessed against any private corporation that denies a person his Civil Right, and that said private corporation is directly responsible for the acts and conducts of its agents, servants and employees. Why should a municipality be any diffrent?

Respondents have asserted and the lower Courts have held that punitive damages against a City, hurts only the innocent taxpayer. Using this same rationale, it could be stated that to award punitive damages against a private corporation should be disallowed, because ultimately, the

private corporation must pass on to the consumers, also the taxpayers, its costs of paying punitive damages.

Furthermore, it was recently articulated by the Federal Government in the bail-out of the Continental Bank of Illinois, by the Federal Deposit Insurance Company, that the policy of spreading the risk to all citizens, is good, for the reasons and on the grounds that the wrongful acts of the few should be distributed among the citizens, where there is a question of public trust.

Following that same rationale, it seems omnipresently clear that § 1981, was intended and should be utilized to allow a claimant punitive damages against a municipal corporation and vis-a-vis, spread the risk on the citizens of the municipality for the purpose of insuring that all citizens, within that City, will not be denied their civil rights. What greater public trust do we have than to insure that all persons retain their civil rights.

This Court is the Court of last resort. The final decision of whether or not to allow punitive damages under 42 U.S.C. § 1981 and to restore to the citizens equal protection under the law, against racially motivated misuses of government power rests here.

III

CERTIORARI SHOULD BE GRANTED REVERSING APPELLATE COURT'S DENIAL OF A REASONABLE FEE TO SUCCESSFUL PLAINTIFF.

Petitioner further reasserts that he has been denied equal protection under the law by the Trial Court's award and the Appellate Courts upholding, of his inadequate and unfair attorneys fee award. While Respondents contend that the $20,000.00 awarded to Petitioner's counsel was more than adequate, Respondents were paid that much just for trial at the lower Court level.

Respondents proposition that the Court should ignore the jury award of $51,004.00 and base its decision upon the amount awarded Plaintiff after remittitur, ignores all the guidelines to follow in determining a fair and reasonable fee as set forth by case law.

Respondents further proposition that Petitioner was only partially successful, is the type of sophistric inbreeding which Petitioner has had to deal with throughout this case. A jury award, in a civil rights case, of $51,004.00 is hardly an unsuccessful verdict. As a matter of fact, any type of award in a Civil Rights case from a jury, is a victory.

Petitioner contends that the jury, by its award of $51,004.00 showed its intent and expressed without questions their dissatisfaction with the municipal government and its employee's behavior in this case. The jury verdict exists for all the world, regardless of whether or not a Judge allows or disallows such verdict to stand. Likewise, counsel for Petitioner was successful on both the § 1981 and § 1983, by obtaining a verdict of $51,004.00, whether or not a Judge allows or disallows such verdict to stand.

Furthermore, Petitioner believes that he was successful in his Title VII claim, but that the Court committed error in dismissing same, as previously set forth in detail.

Lead counsel for Petitioner has been in this case since October, 1978, a period exceeding six (6) years. This is the third appeal which Petitioner has had to file in an attempt to right the wrongs which have been perpetrated against him.

Low attorney fee awards in cases such as this, that have been going on for many years, is an absolute denial of equal protection under the law, since most Plaintiffs who are discriminated against, come from much lower income brackets than the companies or municipalities which commit the wrongs against them. Plaintiffs cannot afford to pay their attorneys for prosecution of their claim, the type of retainer that the big companies and municipalities are able to pay in their defense. Therefore, Plaintiff-Attorneys must rely solely upon Court Awarded fees for their time and efforts expended in a case.

Counsel for Petitioner was awarded $20,000.00 for fees in this matter. This amount will hardly cover the costs expended to date by counsel for Petitioner in the filing, discovery, trial preparation, and three appeals, which Petitioner has had to pursue in this matter.

Therefore, Petitioner respectfully requests that he be granted a fair and reasonable fee for his time and efforts in this case in the amount of $121,000.00.

Respectfully submitted,

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5801 N. Broadway Ext.
Suite 101
Oklahoma City, Oklahoma 73118
Attorney for Petitioner

December, 1984

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this ___ day of December, 1984, three copies of the foregoing Reply to Response Brief in Opposition to the Petition for Writ of Certiorari were deposited in the United States Mails, postage fully prepaid thereon, addressed to counsel for Respondents, Margaret McMorrow-Love, Fellers, Snider, Blankenship, Bailey & Tippens, 24th Floor, First National Center, Oklahoma City, Oklahoma 73102.

By: .....

GROVER MISKOVSKY

Office-Supreme Court, U.S.
FILED
JAN 2 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-689

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Petitioner,

v.

CITY OF ANADARKO, OKLAHOMA; MAYOR OF ANADARKO, CLARK McCASKILL; CITY MANAGER, ROYCE HUNTER; FORMER ACTING CHIEF OF POLICE, J. C. GIVENS; and FORMER ACTING CITY MANAGERS, BOB WILKERSON and RON MADISON,
Respondents.

AMENDED REPLY BRIEF TO RESPONSE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of The United States:

BRUCE POOLAW, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States District Court of Appeals for the Tenth Circuit entered in the above entitled case on June 27, 1984.

Petitioner herein filed his Petition for Writ of Certiorari to the United States District Court of Appeals for the Tenth Circuit on October 25, 1984. Respondents thereafter filed their Response Brief in Opposition to Petition for Writ of Certiorari in November, 1984. Petitioner herewith files his Amended Reply.

Respondents, in their Statement of the Case, attempt to show, as they did at trial, that they had cause to terminate Poolaw for reasons other than race. In this attempt the Respondents failed to mention that the alleged reasons they give for having terminated Poolaw's employment were considered on two different occasions by two different fact-finding bodies, and that both found in favor of Poolaw and against the accusers.

The City of Anadarko had a duty, under law, when evidence failed to support their termination of Poolaw, to reinstate him with back pay. If the City discovered new grounds to terminate, they were under an obligation to give Poolaw notice in writng of this dismissal and the grounds for same; afford him a new hearing; and pursuant to the outcome of that hearing, either reinstate Poolaw, or appeal the decision to the State Supreme Court in the event of a decision favorable to Petitioner. They did none of the above and to date Poolaw has not been reinstated.

It is respectfully suggested, the Respondent, City of Anadarko, openly shows the invidious and incestuous evil of their acts by manipulation of the ordinances and disregard for the rights of the Petitioner when they suggest that evidence of wrongdoing by the Petitioner heard by the Board justified their failure to reinstate Petitioner; notwithstanding the ruling of the Board. Respondents clearly feel they do not have to follow the rules and proper procedures provided by ordinance when the decision of the Board does not suit them. (There was no new evidence; all the evidence was considered by the Board of Review.)

An outline of events below will clarify the acts leading to the Respondents' discrimination of Bruce Poolaw:

1. The Board of Review was presented with all the evidence to support termination of Petitioner at Petitioner's initial hearing;
2. The Board of Review made its ruling in favor of Petitioner;
3. The Respondent, City of Anadarko, apparently did not like the ruling;
4. The Respondent, City of Anadarko, did not appeal the ruling as required by ordinance;
5. The ruling became final to reinstate the Petitioner;
6. A caucasian followed the same procedure and was reinstated; and,
7. Petitioner has not been reinstated or presented with new grounds not previously considered by the Board of Review.

The Charter and Ordinances require that if the Review Board's ruling was favorable to the Petitioner then Respondent was obligated to:

1. Reinstate; or,
2. Appeal the decision; or,
3. Reinstate Petitioner if appeal was favorable to Petitioner or where no appeal was lodged.

Once reinstated the only lawful remedy available to Respondents was to:

1. Fire Petitioner;
2. Give notice of cause;
3. Give a hearing before the Board of Review; and,
4. *Follow the decision of the Board of Review and/or follow appellate procedure.*

However, Respondents did not follow the same procedures they afforded caucasians; thus creating a strong inference based on real evidence of racially motivated intent but instead, arbitrarily chose to ignore the Review

Board and disregard appellate procedure to prevent Petitioner's reinstatement.

One can reasonably conclude that Respondents believe they have the power to arbitrarily refuse to follow the Board's decision, and ignore appeal procedures; and Respondents apparently further believe that since he has not been reinstated he is not employed and the City does not have to fire, notify and give notice, thus creating an unending circle of racially motivated discrimination. These same men are still in power.

Based on this arrogant disregard of Petitioner's rights under color of law the jury agreed with the Board of Review and rendered a jury verdict for $51,004.00.

It is respectfully suggested that no other conclusion can be reached than that the City intentionally and without cause denied Poolaw his Civil rights, equal protection under law and denied him due process of law, and that race was the motivating factor behind these acts. Furthermore, the City's continued denial of reinstatement or employment indicates that the jury verdict of $51,004.00 was justified.

REASONS FOR GRANTING WRIT

I

CERTIORARI SHOULD BE GRANTED TO REVERSE APPELLATE COURT'S DENIAL OF TITLE VII CLAIM.

While Respondents attempt to brush off the conflicting decisions between the Judge (holding no racial motivation) and the jury (finding there was racial motivation) by stating that reasonable men may differ. Poolaw believes that the appellate court was misled in rendering its decision upholding the lower court when one considers all the evidence.

The lower court agreed there was discrimination; but based on what one isolated juror commented to him, he assumed no racially motivated intent. The evidence revealed a clear and convincing preferential treatment of caucasians which raised a strong inference of racially motivated intent. However, when the burden shifted to the Respondents to show a legitimate, non-discriminatory reason for his firing, Respondents failed to produce such proof, and instead advanced an incredible theory that the Board of Review who found in favor of Petitioner had evidence to terminate him. This of course, begs the question. Why did the City, et al., fail to follow the appellate procedures available to them and instead flatly ignore all procedural and remedial avenues available? Where in the procedures available under ordinance is the City authorized to filier through the evidence considered by the Review Board? Of course there is no such authority and Respondents use this created technique to convince the Court of their non-discriminatory intent. The jury verdict of $51,004.00 awarded for racially motivated discrimination seems to have missed the scrutiny of the Appellate Court.

The Appellate Court further erred in discounting the Trial Court's conversation with a woman juror during a voire dire examination in another case, subsequent to the Poolaw trial but prior to the court's final judgment on the Title VII issue, which influenced if not controlled his decision.

Did the lower court query the jurors concerning damages? What would the jury have awarded if punitive damages instruction was not given? If the court had not included the instruction for punitive damages before trial

perhaps the verdict for $51,004.00 would be for actual damages; certainly they would not have been confused in their award.

Would the Judge's decision at the lower court level have been different if he were told, as counsel for Petitioner was after the jury was released, that "they took a long time in reaching a decision because they (the jurors) were split four to two to give Petitioner Two Million Dollars"?

What would the other jurors have told the Judge if he had polled them. Wasn't this juror's comment but one of six. Certainly the Judge's independent judgment was suspect subsequent to his comments on the record.

Petitioner submits that a close scrutiny of the entire transcript of the hearing on Petitioner's Title VII claim by the Appellate Court, would have, without question, shown reversible error on the part of the trial Judge, in his extraneous conversation with a juror prior to the time he had reached a final decision in this matter, as well as his prejudicial treatment of Petitioner's counsel.

II

CERTIORARI SHOULD BE GRANTED REINSTATING JURY AWARD OF PUNITIVE DAMAGES IN THE AMOUNT OF $40,000.00.

Poolaw reasserts his contention that the Appellate Court erred in upholding Trial Court's decision striking $40,000.00 in punitive damages which the jury awarded against the City of Anadarko, under 42 U.S.C. § 1981, concluding that punitive damages are not recoverable against a Municipal corporation.

It is well settled that actual and compensatory or punitive damages may properly be awarded private Plaintiffs when suing under 42 U.S.C. § 1981, even when coupled with a Title VII claim. However, the law is still unsettled and at the best unclear, as to whether or not punitive damages should be awarded against a Municipal corporation.

There is nothing inherent in Civil Rights cases, which specifically precludes an award of substantial punitive damages in appropriate instances under 42 U.S.C. § 1981. It is suggested by Petitioner that in determining the appropriate amount of punitive damages in such actions, the court should look to punitive damage awards in other intentional tort cases.

The argument that because Congress was silent with reference to punitive damages against municipal corporations one should therefore conclude that punitive damages should be disallowed, is both presumptive and faulty. There are no notes which indicate that this was the intention of Congress, or that courts should prohibit the allowance of punitive damages against municipal corporations in cases such as this under § 1981.

Judge O'Conner's opinion in the case from the District of Kansas, *Boyd* v. *Shawnee Mission Public Schools*, 522 F.Supp. 1115 (1981), was that:

> "The historical analysis and consideration of competing social policies relied on by the Court in its § 1983 cases are not found in the § 1981 area. The same preservation of traditional municipal immunity found by the *City of Newport* Court in the deliberations of the 42nd Congress with regard to § 1983 cannot be imputed to the legislators enacting § 1981."

Respondents rely heavily on the case of *City of Newport* v. *Facts Concerts, Inc.*, to support their position. However, Petitioner believes that Judge O'Conner's opinion is thorough, incisive and well thought-out, and in complete agreement that that same governmental immunity established under § 1983, should not be imputed or construed to include § 1981.

There is no question, that punitive damages can be assessed against private corporations that deny a person his Civil rights, and that said prviate corporations are directly responsible for the acts and conduct of their agents, servants and employees. Why should a municipal corporation be any different?

Respondents assert that punitive damages against a City, hurt only the innocent taxpayer. Using this same rationale, it could be stated that awards of punitive damages against a private corporation should be disallowed, because ultimately, the private corporation passes on to the consumers (also the taxpayers) its costs of paying punitive damages.

Furthermore, the Federal Government's "bail-out" of the Continental Bank of Illinois by the Federal Deposit Insurance Company, recently articulated, that the policy of spreading the risk to all citizens is good, for the reasons that the wrongful acts of the few should be distributed among the citizens, where there is a question of public trust.

Following that same rationale, it seems omnipresently clear that § 1981 was intended, and should be utilized, to allow a claimant punitive damages against a municipal corportion and vis-a-vis, spread the risk on the citizens of the municipality for the purpose of insuring that all citi-

zens within that City, will not be denied their civil rights. What greater public trust do we have than to insure that all persons retain their civil rights.

III

CERTIORARI SHOULD BE GRANTED REVERSING APPELLATE COURT'S DENIAL OF A REASONABLE FEE TO SUCCESSFUL PLAINTIFF.

Petitioner further reasserts that he has been denied equal protection under the law by the Trial Court's award and the Appellate Courts upholding, of his inadequate and unfair attorneys fee award. While Respondents contend that the $20,000.00 awarded to Petitioner's counsel was more than adequate, certainly a review of the record will show that the court was without justification in upholding the lower court's attorney fees award since the lower court ignored all guidelines for making the fee award. It should be noted that Respondents were paid that much for trial at the lower court level.

Perhaps the best indicator of Respondents incredulity is the position that a jury verdict in favor of plaintiff of $51,004.00 is insignificant and not substantial. The jury gave their award of $51,004.00 for the damages resulting to Petitioner because of blatant discrimination.

Respondents proposition that the Court should ignore the jury award of $51,004.00 and base its decision upon the amount awarded Plaintiff after remittitur, is sophistry and suggests that the court ignore all other guidelines used in determining a fair and reasonable fee established by case law.

Petitioner contends that the jury, by its award of $51,004.00, showed its intent and expressed without question their dissatisfaction with the municipal government and its employee's behavior in this case. The jury verdict exists for all the world, regardless of whether or not a judge allows or disallows such verdict to stand. Likewise, counsel for Petitioner was successful on both § 1981 and § 1983, by obtaining a verdict of $51,004.00.

Counsel for Petitioner has been in this case since October, 1978, a period exceeding six (6) years. This is the third appeal which Petitioner has had to file in an attempt to right the wrongs which have been perpetrated against Petitioner. Six years without pay and without relief.

Low attorney fee awards in cases such as this, are an absolute denial of equal protection under the law, since most plaintiffs who are discriminated against come from much lower income brackets than the companies or municipalities which commit the wrongs against them. Plaintiffs cannot compete with the type of retainers paid to the corporate giants, city and private. Therefore, if the plaintiff's attorney fee is not rendered on the guidelines established, there will develop an unwillingness of private counsel to represent the offended persons who stand alone against the giant corporate assailants.

Counsel for Petitioner was awarded $20,000.00 for fees in this matter. This amount will hardly cover the costs expended to date by counsel for Petitioner in the filing, discovery, trial preparation, and three appeals, which Petitioner has had to pursue in this matter.

Respectfully submitted,

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December, 1984

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this ..... day of December, 1984, three copies of the foregoing Amended Reply Brief to Response Brief in Opposition to the Petition for Writ of Certiorari were deposited in the United States Mails, postage fully prepaid thereon, addressed to counsel for Respondents, Margaret McMorrow-Love, Fellers, Snider, Blankenship, Bailey & Tippens, 24th Floor, First National Center, Oklahoma City, Oklahoma 73102.

By: .....
GROVER MISKOVSKY